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IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS

CIVIL DIVISION

In re the matter of LEONARD RODBERG — Civil Action No. EBD-71-172-G

MOTION TO INTERVENE

Comes now Movant, United States Senator Mike Gravel and moves this Honorable Court for leave to intervene in the above captioned cause and as reasons therefore states:

1) Leonard Rodberg is a personal servant of the Movant.

2) As Movant's personal servant, Leonard Rodberg has performed acts which are now the subject of an inquiry by a Federal Grand Jury.

3) The aforesaid Federal Grand Jury has subpoenaed Leonard Rodberg to appear and give testimony with respect to the aforesaid acts on Friday, August 27, 1971 at 10 A.M..

4) All of the aforsaid acts performed by Leonard Rodberg for the Movant were under the Movant's direction and control.

5) All of the acts performed by Leonard Rodberg upon orders from the Movant are immune from judicial inquiry by virtue of Movant's constitutional privileges and constitutional duties.

6) The question presented herein raises serious and substantial constitutional issues which have not but should be decided by this Court.

7) No other party to the above captioned cause can adequately represent the interest of Movant.

8) The granting of this motion would best serve the interest of Justice.

WHEREFORE, Movant respectfully requests that this Honorable Court grant the above captioned Motion to Intervene.

Robert Reinstein
Temple University School of Law
Philadelphia, Pennsylvania
215-787-8576

Charles Louis Fishman
Attorney for Movant
633 East Capitol Street
Washington, D.C. 20003
202-546-0520

Of Counsel:
Herbert O. Reid, Sr.

MOTION FOR SPECIFICATION

Comes now movant, United States Senator Mike Gravel, and respectfully moves this Court for an Order requiring the Government to specify in detail the purpose, scope and exact nature of the questions to be asked of Dr. Leonard Rodberg by the Federal grand jury. Movant submits that absent such specification, the appearance of Dr. Rodberg before the grand jury will violate movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, movant states as follows:

1. Dr. Rodberg was served with a subpoena on Tuesday, August 24, 1971, which seeks to compel Dr. Rodberg's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

2. Dr. Rodberg is a personal servant of movant and assisted movant in the discharge of his duties as a United States Senator, and in so doing has acted under movant's direction and control.

3. In his aforesaid capacity as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constitutents, at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.

4. It is believed that the questions to be asked of Dr. Rodberg by the grand jury will concern the acts of movant and of Dr. Rodberg set forth in paragraphs 2 and 3.

5. All of the said acts performed by movant and by Dr. Rodberg are immune from judicial inquiry by virtue of movant's constitutional privileges and constitutional duties.

Respectfully submitted,

ROBERT J. REINSTEIN
1715 N. Broad Street
Philadlephia, Pa. 19122

CHARLES L. FISHMAN
633 E. Capitol Street
Washington, D. C. 20003

Attorneys for Senator Gravel

MOTION TO QUASH GRAND JURY SUBPOENA

Comes now movant, United States Senator Mike Gravel, and respectfully moves this Court for an order quashing a subpoena served upon Dr. Leonard Rodberg on Tuesday, August 24, 1971, which seeks to compel Dr. Rodberg's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

Movant submits that the subpoena served upon Dr. Rodberg should be quashed becasue it violates movant's Con-

gressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to movant by the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, movant states as follows:

1. Dr. Rodberg is a personal servant of movant and has assisted movant in the discharge of his duties as a United States Senator, and in so doing has acted under movant's direction and control.

2. In his aforesaid capacity as personal assistant to movant, Dr. Rodberg assisted movant in preparing for disclosure and subsequently disclosing to movant's colleagues and constitutents at a hearing of the Senate Subcommittee on Public Buildings and Grounds, the contents of the so-called "Pentagon Papers," which were critical of the Executive's conduct in the field of foreign relations.

3. It is believed that the questions to be asked of Dr. Rodberg by the grand jury will concern the acts of movant and of Dr. Rodberg set forth in paragraphs 1 and 2.

4. All of the said acts performed by movant and by Dr. Rodberg are immune from judicial inquiry by virtue of movant's constitutional privileges and constitutional duties.

5. The appearance of Dr. Rodberg before the grand jury would violate movant's constitutional privileges.

Respectfully submitted,

ROBERT J. REINSTEIN
1715 N. Broad Street
Philadelphia, Pa. 19122

CHARLES L. FISHMAN
633 E. Capitol Street
Washington, D.C. 20003

Attorneys for Senator Gravel

MOTION TO QUASH GRAND JURY SUBPOENA AND TO STAY GRAND JURY APPEARANCE PENDING DISPOSITION OF THIS MOTION.

Dr. Leonard S. Rodberg respectfully moves this Court for order quashing a subpoena served upon him on Tuesday, August 24, 1971, which seeks to compel his appearance before a federal grand jury sitting in this district, to wit, in Boston, Massachusetts, on Friday, August 27, 1971 at 10:00 a.m. Alternatively, Dr. Rodberg moves for the entry of a protective order limiting the questioning of movant before the grand jury to a scope consistent with law. Further, Dr. Rodberg respectfully requests that his subpoena be adjourned and his appearance before the grand jury be stayed pending disposition of this motion and that he be permitted time in which to prepare and submit to this Court substantial affidavits and other documentary material in support of this motion.

Movant submits that his subpoena should be quashed upon, *inter alia*, each of the following independent grounds:

a. That it violates Congressional privilege, separation of powers and the Speech and Debate Clause;

b. That it abridges movant's rights to freedom of the press, freedom of expression and freedom of association in violation of the First Amendment.

In support of paragraphs (a) and (b), movant alleges as follows:

1. On June 29, 1971 Mike Gravel, United States Senaotr from the State of Alaska, in the course of a meeting of the Senate Subcommittee on Public Buildings and Grounds read publicly a portion of the so-called "Pentagon Papers," and inserted the rest of the papers in his possession into the record of the subcommittee.

2. Immediately after that reading and at the express direction of Senator Gravel, aides and assistants to the Sen-

ator distributed to members of the press and others copies of the papers from which Senator Gravel had read.

3. On the night of June 29, 1971, movant was and continues to be, down to the present date, a member of Senator Gravel's staff.

4. On Wednesday, August 18, 1971, it was reported and alleged in the *Washington Post* that Senator Gravel had turned over copies of the "Pentagon Papers" to a Boston, Massachusetts, publisher for publication as a book. It was further alleged that movant here had arranged on Senator Gravel's behalf the transfer and publication of these papers. It was further alleged that movant here had made previous unsuccessful efforts to arrange publication of the papers in Senator Gravel's possession. See *Washington Post* article attached hereto as Exhbiit "A."

5. On Tuesday, August 24, 1971, it was reported and alleged in an article in "Boston After Dark," a weekly newspaper, that, after several earlier unsuccessful attempts, movant had, at Senator Gravel's behest, arranged the publication of the papers in Senator Gravel's possession. See the article attached hereto as Exhibit "B."

6. On the evening of that same day, Tuesday, August 24, movant was served at his home in Silver Spring, Maryland, by an agent of the Federal Bureau of Investigation with the instant subpoena which seeks to compel his appearance on Friday, August 27 at 10:00 a.m. before a federal grand jury here in Boston. See subpoena attached hereto as Exhibit "C."

7. It is believed (as shown in the affidavit attached hereto) that the questions to be asked of movant before the grand jury will concern the June 29 meeting of the Subcommittee on Public Buildings and Grounds and the distribution of papers that occurred immediately thereafter.

8. It is further believed that the questions to be asked of movant before the grand jury will concern the allegation made in the newspaper articles attached hereto as Exhibits "A" and "B" that he has been involved in an effort to pub-

lish as a book the documents in Senator Gravel's possession.

9. Movant believes that an appearance for the purpose of questioning him regarding these matters raises substantial and fundamental issues concerning the scope of Congressional privilege and of the Speech and Debate Clause, and the distribution of governmental authority among the separate and distinct branches of government.

10. Movant further believes that such questions raise important and delicate issues regarding First Amendment freedom, particularly freedom of the press, freedom of expression and freedom of association.

11. Movant therefore sought to retain legal counsel in connection with his appearance before the grand jury.

* * * * *

GOVERNMENT OPPOSITION TO INTERVENOR'S MOTION FOR SPECIFICATION

Intervenor, United States Senator Mike Gravel, requests the Court for an Order requiring ". . . the government to specify in detail the purpose, scope and exact nature of the questions to be asked of Dr. Leonard Rodberg by the Federal Grand Jury." The motion is totally without precedent. The Federal Rules of Criminal Procedure certainly do not provide for such an unusual motion. The Federal Rules of Civil Procedure do provide for a "Motion for More Definite Statement," but this is not what movant is requesting, nor is this a civil matter governed by the Federal Rules of Civil Procedure.

On the merits, a witness need not be apprised of the subject matter under inquiry by a Grand Jury. *In Re Meckley*, (D.C.M.D, Penn. 1943), 50 F. Supp. 274; *affd.* 137 F.2d 310; *cert. den.* 320 U.S. 370.

Further, a witness can neither question nor control the scope of a Grand Jury investigation. *Blair v. United States*, 250 U.S. 273.

WHEREFORE, this motion should be denied.

Respectfully submitted,

PAUL C. VINCENT
Attorney – U.S. Department of Justice

JON H. MARPLE
Attorney – U.S. Department of Justice

GOVERNMENT'S MEMORANDUM IN OPPOSITION TO LEONARD S. RODBERG'S MOTION TO QUASH A GRAND JURY SUBPOENA

* * * * *

Should legislators succeed in disregarding the judicial powers of inquiry into criminal conduct by refusing compliance with a Grand Jury subpoena, they would have elevated themselves above the criminal law virtually by their bootstraps. No testimony sought here will seek to review a Congressman's political views, his motives or any exercise of legislative discretion. In responding to a subpoena, Senator Gravel would only fulfill his own duty as a citizen to assist the Executive branch in its own Constitutional obligation to enforce the laws of the United States. Should questioning prove self-incriminating, the Senator would retain his own Fifth Amendment privilege, in this regard. To withhold testimony on the basis of exemption would frustrate the separation of powers doctrine by interfering in executive proceedings, and in this case to forswear Senator Gravel's own vested duty to uphold the Constitution and laws of the United States.

* * * * *

The Government neither affirms nor denies that this proceedings is brought to investigate the disclosure of the so-called "Pentagon Papers". Yet assuming *arguendo*, that such be the case the Senator could not claim further that the grand jury cannot lawfully inquire into the business of reading and publishing the "Pentagon Papers" as it constitutes privileged legislative business. The speech and debate clause has been construed to protect not only speeches given on the floor of Congress, as in *Johnson, supra,* but also to protect debates and speeches in committee hearings, as well as reports, resolutions, the act of voting and "in short, to things generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn v. Thompson,* 103 U.S. 168, 204 (1880). Yet the action of Senator Gravel which he assumes has led to the subpoena of Dr. Rodberg stands in no such footing. The Senator convened a special, unauthorized, and untimely meeting of the Senate Subcommittee on Public Works (at midnight on June 29, 1971), for the purpose of reading the documents and thereafter placed all unread portions in the subcommittee record, with Dr. Rodberg soliciting publication following the meeting. (See news articles attached to motion of Dr. Rodberg). The Congress does not enjoy uncurbed power to conduct business; excursions of committee hearings into private lives unconnected with a legitimate legislative purpose have long been held unconstitutional. *Kilbourn v. Thompson, supra; Marshall v. Gordon,* 243 U.S. 531 (1917). The power of the judiciary to reject unauthorized legislative acitivity stands upon no less a precedent than *Marbury v. Madison,* 1 Cranch (5 U.S.) 87 (1803). The prerogative of Judicial review has been exercised often in recent years to curb extra-legislative excursions by Congressional committees. *Watkins v. United States,* 354 U.S. 178 (1957); *McGrain v. Daugherty,* 273 U.S. 135 (1927); *Hentoff v. Ichord,* 318 F. Supp. (D.C. 1970). The reading of the paper in question can have no possible relationship to the legislative business with which Senator Gravel has sought to cloak himself.

* * * * *

Not being engaged in official subcommittee business, his actions cannot be above scrutiny by those charged to enforce the criminal statutes.

* * * * *

Such a privilege, being derivative in nature, cannot be claimed where it would not protect the Senate member concerned; here, Senator Gravel can himself claim no exemption. The Speech and Debate clause was enacted in its present form specifically to insure that Senators would remain subject to obligations and sanctions of the criminal law and it has been applied in precisely this fashion for over 170 years. Accordingly, legislators have been deemed subject to subpoena and have occasionally been prosecuted. Under the "privilege" provision, Congressmen and their servants have always been subject to judicial limitations upon their actions where, even though garbed in the trappings of Congressional propriety, they have issued subpoenas or ordered imprisonment which transgressed their Constitutional powers. Thus, this court has complete powers to find that the activities in which the Senator and Dr. Rodberg were engaged were far removed from legitimate Congressional business and cannot therefore claim the protection of the privilege clause.

* * * * *

AFFIDAVIT OF MIKE GRAVEL

I, Mike Gravel, being first duly sworn, do depose and say that Dr. Leonard Rodberg is, and has been since June 29, 1971, a member of my personal staff in the United States Senate.

MIKE GRAVEL

Commonwealth of Massachusetts
Suffolk, ss.
Subscribed and Sworn to
before me this 10th day
of September, 1971.

Margaret M. Flaherty
NOTARY PUBLIC

My Commission expires: 11/6/75

AFFADAVIT OF ROBERT G. DUNPHY

Robert G. Dunphy, Sergeant at Arms, United States Senate, Washington, D.C. 20510, being duly sworn, deposes and says:

1. By letter to me dated June 29, 1971, Senator Gravel designated Dr. Leonard Rodberg as a member of his personal staff. Senator Gravel's letter is set forth below:

"Mr. Robert G. Dunphy
Sergeant at Arms
United States Senate
Washington, D.C. 20510

Dear Mr. Dunphy:

Effective this date please add to my personal staff roll the name of Dr. Leonard Rodberg.

Dr. Rodberg will serve as a special assistant to me, with full access to my office, performing duties I assign and under my direct supervision.

Sincerely,

Mike Gravel".

Robert G. Dunphy
Sergeant at Arms
United States Senate

Subscribed and Sworn to before me this 10th day of September, 1971. My Commission expires on the 14th day of Dec. 1971.

Notary Public
Wm. R. Luirs

MOTION FOR FURTHER RELIEF

Comes now Movant, Mike Gravel, United States Senator, and respectfully moves this Court for an order granting further relief to prevent the abridgement of Movant's constitutional rights under the Speech and Debate Clause of the Constitution, Article I, Section 6, Clause 1.

In support of this Motion, Movant states as follows:

1) This Court has under consideration Movant's Motion for Reconsideration and/or Stay Pending Appeal of this Court's Memorandum of decision and Protective Order entered on October 4, 1971 in the above captioned cause.

2) The United States has subpoenaed certain witnesses for the purpose of inquiring into matters protected from inquiry by Article I, Section 6, Clause 1 and the Protective Order issued by this Court on October 4, 1971. Specifically, the government wishes to inquire into how and from whom Movant received certain material commonly referred to as the Pentagon Papers.

3) The United States has subpoenaed certain other witnesses for the purpose of inquiring into Movant's publication of the official transcript of the Senate Subcomittee on Building and Grounds. The constitutional permissibility of such an inquiry is now before the Court for reconsideration in the above captioned cause.

4) Movant has no control over the willingness of those subpoenaed to answer questions prohibited by this Court's Protective Order of October 4, 1971 or Article I, Section 6, Clause 1.

5) Movant has no control over the willingness of those subpoenaed to answer questions concerning Movant's publication of the official transcript of the aforesaid Senate Subcommittee.

6) If this Court decides that publication of the official record of a Senate Subcommittee is constitutionally protected the grand jury will be barred from questioning anyone about his conduct with respect thereto.

7) If this Court decides that publication of the official record of a Senate Subcommittee is not constitutionally protected Movant has asked for a stay of this Court's decision pending appeal. To permit any witness to testify with respect to the publication of the aforesaid transcript would moot the constitutional claim of Movant prior to the final resolution of the important and complex constitutional issues presented herein.

8) If the United States seeks answers to questions prohibited by this Court's Protective Order of October 4, 1971, Movant has no procedure with which to object and to secure a ruling from this Court.

9) If the United States seeks answers to questions concerning publication of the aforesaid official record of a Senate Subcommittee now under submission to this Court, Movant has no procedure with which to object and to secure a ruling from this Court.

10) If this Court permits inquiry into the aforesaid areas and others before the grand jury Movant's constitutional right will have been irreparably violated.

WHEREFORE, Movant respectfully requests this Honorable Court to grant the following further relief:

1) To require a listing from the United States of all those who have been subpoenaed or are to appear before the grand jury to give testimony.

2) To hold a hearing to determine which of the listed witnesses has privileged information which, constitutionally, cannot be inquired into, or should not be inquired into pending final determination on reconsideration.

3) To require the United States to specify all questions to be asked each witness, covered by Paragraph 2 above, and to rule on the constitutional permissibility of each said question.

If this Court should deny this Motion, Movant requests this Court to grant a stay of all subpoenas now outstanding or to be issued, pending appeal to the United States Court of Appeals for the First Circuit.

Charles Louis Fishman
633 East Capitol Street
Washington, D.C. 20003
202-546-0520

Attorney for Movant

Robert J. Reinstein
Temple University School
of Law
Philadelphia, Pennsylvania
215-787-8576

Howard O. Reid, Sr.
Howard University School
of Law
Washington, D.C.
202-636-6671

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

Civil Division

MIKE GRAVEL,
UNITED STATES SENATOR

v. Civil Action No. E.B.D. 71-209-G

JOHN DOE

In re the matter of
HOWARD WEBBER

MOTION TO INTERVENE

Comes now Movant, United States Senator Mike Gravel and moves this Honroable Court for leave to intervene in the above captioned cause and as reasons therefore states:

1) Howard Webber is the editor of M. I. T. Press.

2) As the editor of M. I. T. Press, Mr. Webber had contact and discussions with members of Movant's personal staff which contacts and discussions are now the subject of an inquiry by a Federal Grand Jury.

3) The aforesaid Federal Grand Jury has subpoenaed Mr. Webber to appear and give testimony with respect to the aforesaid contact and discussion on Wednesday or Thursday, October 27 or 28, 1971.

4) All of the aforesaid contacts and discussions between Mr. Webber and members of Movant's personal staff relate to the publication of the June 29, 1971 official transcript of the United States Senate Subcommittee on Buildings and Grounds.

5) All of the aforesaid contacts and discussions between Mr. Webber and Movant's personal servants are immune from judicial inquiry by virtue of Movant's constitutional privileges and duties.

6) The question presented herein raises serious and substantial constitutional issues which have not but should be decided by this Court.

7) No other party to the above captioned cause can adequately represent the interest of Movant.

8) The granting of this motion would best serve the interest of Justice.

9) Movant has no information upon which to determine if Mr. Webber plans to appear before the Grand Jury and give testimony in violation of Movant's constitutional rights.

WHEREFORE, Movant respectfully requests that this Honorable Court grant the above captioned Motion to Intervene.

Charles Louis Fishman
633 East Capitol Street
Washington, D. C. 20003
202-546-0520

Attorney for Movant

Robert Reinstein
Temple University School of Law
Philadelphia, Pennsylvania
215-787-8576

Howard O. Reid, Sr.
Howard University School of Law
Washington, D. C.
202-636-6671

MOTION TO QUASH OR STAY GRAND JURY SUBPOENA

Comes now Movant, United States Senator Mike Gravel, and respectfully moves this Court for an order quashing or staying a subpoena served upon Howard Webber which seeks to compel Mr. Webber's appearance before a Federal grand jury sitting in this District, to wit, in Boston, Massachusetts.

Movant submits that the subpoena served upon Mr. Webber should be stayed because it violates Movant's Congressional privilege to be immune from judicial inquiry of acts done by him and his personal staff in the discharge of his duties as a United States Senator, said privilege secured to Movant by the Speech and Debate Clause of the Consitution, Article I, Section 6, Clause 1.

1) The United States has subpoenaed Mr. Webber for the purpose of questioning him about the publication of the official Senate Subcommittee transcript involved in the case of *Mike Gravel, United States Senator v. United States* (Docket No. EBD 71-172).

2) This Court has under consideration Movant's Motion For Reconsideration in the case of *Mike Gravel, United States Senator v. United States* (Docket No. EBD 71-172).

3) If this Court decides that publication of the official record of a Senate Subcommittee is constitutionally protected the grand jury will be barred from questioning anyone, including Mr. Webber, about his conduct with respect thereto.

4) If this Court decides that publication of the official record of a Senate Subcommittee is not constitutionally protected Movant has asked for a stay of this Court's decision pending appeal. To permit Mr. Webber to testify with respect to the publication of the aforesaid transcript would moot the constitutional claim of Movant prior to the final resolution of the important and complex constitutional issues presented herein.

5) No substantial injury will result to the United States from the granting of this Motion.

WHEREFORE, Movant respectfully requests that this Honorable Court grant the above Motion to Quash or Stay the subpoena served upon Howard Webber pending final disposition of the case entitled *Mike Gravel,* U. S. S. v. *United States* EBD 71-172.

Charles Louis Fishman
633 East Capitol Street
Washington, D. C. 20003
202-546-0520

Robert Reinstein
Temple University School
of Law
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215-787-8576

Howard O. Reid, Sr.
Howard University School
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202-636-6671

UNITED STATES V. JOHN DOE

STEPHEN PARKHURST,
Vice-President and Cashier, New England Merchants Bank, Prudential Center, Boston, Mass.

You are hereby commanded to appear in the United States District Court for the District of Massachusetts at P.O. & Courthouse Building, in the city of Boston on the 10th day of November 1971 at 10 o'clock A.M. to testify before the Grand Jury and bring with you the records of the checking accounts, both special and regular, maintained by the Unitarian Universalist Association, Inc., and Beacon Press, Inc., 25 Beacon Street, Boston, Massachusetts from June 1, 1971 through October 15, 1971, such records to include, but not limited to, all deposits and withdrawls

during the aforementioned period of time, and copies of all deposit slips and checks drawn on each account, and items deposited, in the amounts of $10,000 and above.

This subpoena is issued on application of the United States.

Please report to: Richard E. Bachman, assistant U.S. Attorney, Chief, Criminal Division, Room 1107, P.O. & Courthouse Building, Boston, Mass.

Date, October 28, 1971.

MEMORANDUM AND ORDER DENYING MOTION FOR FURTHER RELIEF

OCTOBER 29, 1971

(United States of America v. John Doe; in the matter of a grand jury subpoena served upon Leonard S. Rodberg)

By memorandum of decision and protective order issued October 4, 1971, the court prohibited a grand jury inquiry into the legislative acts of intervenor United States Senator Mke Gravel. by a motion for further relief the Senator seeks a further order requiring the government to list the names of prospective grand jury witnesses and to specify all questions to be asked each witness and moves that the court by a hearing in advance of a witness's appearance determine whether a witness has privileged information which may not be the subject of inquiry consistently with the Speech or Debate Clause of the Constitution of the United States, Art. I, § 6, cl. 1* At a hearing on the motion counsel for the intervenor submitted that, unless further relief of the type requested is ordered, the court and the intervenor have no way of assuring that the court's pro-

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*The intervenor filed a separate motion that he be furnished with a transcript of the grand jury proceedings to date. By separate order endorsed on the motion it was also denied.

tective order of October 4, 1971 is being observed and that questions which may arise during the grand jury proceedings regarding the applicability of the protective order will be properly decided. The court denied the motion from the bench and stated that this memorandum and order would subsequently be filed.

Intervenor's motion is denied on the following grounds: (a) The court has no reason to doubt that its protective order will be obeyed. At the hearing, government counsel stated that it would be. Attorneys are officers of the court on whose good faith the court customarily relies and there is no reason why an exception should be made in this case. (b) The court believes that its protective order issued October 4 is unambiguous. The purport of the order is explained at length in the memorandum accompanying it. (c) The relief sought by the intervenor in his motion for further relief would impede the grand jury's investigation. A balance must be struck between the intervenor's right not to be intimidated by the Executive by an inquiry into his legislative acts, *United States v. Johnson*, 1966 383 U.S. 169, 181, and the grand jury's right not to be hobbled by a daily dissection of its activities.

In connection with the court's staying the enforcement of subpoenas on witnesses Leonard Rodberg and Howard Webber, the court has today issued a supplemental protective order prohibiting for a ten-day period inquiry into Senator Gravel's arranging for publication of the so-called Pentagon Papers. At the hearing counsel for the intervenor urged that the same further relief be granted for the purpose of implementing any such supplemental protective order. For the same reasons the court also denies the intervenor's motion as applied to the supplemental protective order.

[United States District Court, District of Massachusetts, E.B.D. No. 71-172-G. E.B.D. No. 71-209-G]

Supplemental Protective Order, October 29, 1971

(United States of America versus John Doe, in the matter of a grand jury subpoena served upon Leonard S. Rodberg, in the matter of a grand jury subpoena served upon Howard Webber)

Garrity, J. In its memorandum of decision dated October 4, 1971 the court rejected the contention of the witness Rodberg and the intervenor Senator Gravel that private publication of the so-called Pentagon Papers may not be inquired into consistently with the Speech or Debate Clause of the Constitution of the United States, Art. I, § 6, cl. 1. However, the arguments urged on behalf of the witness and intervenor are substantial and by no means frivolous. In order that the intervenor's position may be preserved on appeal, the court orders that the following Supplemental Protective Order be entered and remain in effect for ten days: * *

No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct in arranging for the private publication of the Pentagon Papers nor about Dr. Leonard S. Rodberg's conduct in arranging for said publication to the extent that what he did was in his capacity as a member of the Senator's personal staff.

United States District Judge

** This period corresponds with the duration of the stays ordered on October 28, 1971 staying enforcement of subpoenas on witnesses Leonard Rodberg and Howard Webber on application of the intervenor.

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331

UNITED STATES OF AMERICA

v.

JOHN DOE

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant

No. 71-1332

SAME,

v.

SAME

SAME

Before McEntee and Coffin, Circuit Judges

MEMORANDUM and ORDER
Entered October 29, 1971

Hearing having been held on Intervenor's motion for stay pending appeal from the district court's denial of his motion for further relief and, it appearing that: (1) the integrity of

the processes of a grand jury must not be lightly regarded; (2) the grand jury here convened is not restricted to investigation of the specific crimes described below; (3) the allegations of possible infringements of the rights of the Intervenor under Article I, Section 6, Clause 1, of the Constitution of the United States as well as allegations of violation of the doctrines of separation of powers, raise important issues of substance, the harm of any such alleged infringements being irreparable; (4) an expedited schedule for hearing appeals on related issues has been adopted, such hearing to be held on November 4, 1971, and it being contemplated that speedy disposition of these issues including those raised by the instand motion, may be forthcoming,

It Is Hereby Ordered that until further order of this court, the grand jury shall not pursue its inquiry into the retention of public property or records with intent to convert (18 U.S.C. § 641), the gathering and transmitting of national defense information (18 U.S.C. § 793), the concealment or removal of public records or documents (18 U.S.C. § 2071), or conspiracy to commit such offenses or to defraud the United States (18 U.S.C. § 371) insofar as these or any other crimes may relate to the so-called "Pentagon Papers," in whatever form. However, it shall be empowered to continue its investigation into any other crimes.

It is further ordered that the parties be excused from reproducing the records on appeals in appendix form, that appellants' brief is to be filed on or before five p.m., Monday, November 1, 1971, and that appellee's brief is to be filed on or before five p.m. Wednesday, November 3, 1971. It is further ordered that the parties are granted leave to file four copies of their briefs in reproduced form to comply with Rule 5(d) and that service of said briefs is to be made in hand.

By the Court:

/s/ Dana H. Gallup
Clerk

STIPULATION

November 5, 1971

It is hereby stipulated between the parties hereto that until the termination of the restraining order entered by the United States Court of Appeals for the First Circuit on October 29, 1971, no representatives of the United States shall seek to obtain documents relating to the so-called "Pentagon Papers" within the District of Massachusetts for their own examination or for the use of a grand jury by the force or use of a subpoena.

/s/ Charles Louis Fishman
Counsel for Appellants

/s/ Warren P. Reese
Counsel for Appellees.

MOTION

The United States of America moves the court for an order modifying its order entered October 29, 1971, in cases Nos. 71-1331 and 71-1332, *United States v. John Doe – Mike Gravel United States Senator, Intervenor,* restraining the grand jury from pursuing its inquiry into crimes relating to the so-called "Pentagon Papers," to permit investigation by the grand jury into such crimes, provided that no witness shall be subpoenaed to appear or testify before the grand jury in the District of Massachusetts concerning the acquisition, use or publication of the "Pentagon Papers" by Senator Mike Gravel or any member of his staff, or any matter related thereto.

This motion is based on the attached affidavit of Warren P. Reese and the files and records of the case.

DATED: November 26, 1971.

Respectfully submitted,

JAMES N. GABRIEL
United States Attorney

/s/ Warren P. Reese
WARREN P. REESE
Assistant U. S. Attorney

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 71-1331.

UNITED STATES OF AMERICA,

v.

JOHN DOE

MIKE GRAVEL, UNITED STATES SENATOR,
Intervenor, Appellant.

No. 71-1332 UNITED STATES OF AMERICA

v.

JOHN DOE,
MIKE GRAVEL, United States Senator,
Intervenor, Appellant

Before ALDRICH, *Chief Judge*
McENTEE and COFFIN, *Circuit Judges*

MEMORANDUM and ORDER

Entered November 29, 1971

It is ordered that the grand jury may pursue its inquiry into crimes relating to the so-called Pentagon Papers, provided that neither Senator Mike Gravel nor any member of his staff or of the staff of the subcommittee on Buildings and Grounds shall be subpoenaed to testify, and no witness shall be questioned concerning the acquisition, use, publication, or republication of the Pentagon Papers by Senator Mike Gravel or by any member of the staff as above defined, until further order of this court. The restraining

order entered October 29, 1971 shall remain in full force in all other aspects until further order of this court.

By the Court:

/s/ Dana H. Gallup
Clerk

Enter:
/s/ Aldrich, Ch. J.

[Cert. cc: Clerk, U.S.D.C., Mass.;
cc: Messrs. Fishman, Reid, Reinstein and Reese.]

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SAME

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Before ALDRICH, Chief Judge,
McENTEE and COFFIN, Circuit Judges.

ORDER OF COURT

Entered January 18, 1972

Pursuant to opinion of instant date, the broad stay granted on October 29, 1971, as modified, is hereby revoked

and there is substituted the order contained in the judgment of January 7, 1972 as clarified by the explanatory clause contained in our opinion defining

> "actions" as "in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention."

The present order of revocation and substitution is stayed until January 26, 1972.

The motion for clarification is otherwise denied.

The motion for reconsideration is denied.

By the Court:

/s/ Dana H. Gallup
Clerk

Enter:
/s/ Aldrich, Ch. J.

[cc: Messrs. Fishman, Reid, Reinstein and Nissen.]

VOLUME I

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA	:	
v.	:	EBD 71-172-G
JOHN DOE	:	

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 2, Federal Building, Boston, Massachusetts, on Friday, August 27, 1971.

APPEARANCES:

Paul Vincent, Esq., and
John Marple, Esq.,
Attorneys, Department of Justice,
appeared for the government.

James Reif, Esq., and
Doris Peterson, Attorney,
appeared for Leonard Rodberg.

Robert Reinstein, Esq., and
Charles L. Fishman, Esq.,
appeared for Senator Mike Gravel.

[2] PROCEEDINGS

THE CLERK: Emergency Business Docket Number 71-172, United States versus John Doe.

THE COURT: I see government counsel here, Mr. Vincent. Is there anyone with you representing the government?

MR. VINCENT: Yes, your Honor, my associate, John Marple.

THE COURT: Oh, yes. I see Mr. Marple. Now here is an application for a stay by Dr. Rodberg. Is he present?

DR. RODBERG: Yes, sir.

THE COURT: I see. And then counsel for Dr. Rodberg are Miss or Mrs. Peterson.

MISS PETERSON: Miss Peterson.

THE COURT: And Mr. Reif. Well, I simply have another matter scheduled, a hearing on a temporary restraining order, for eleven o'clock and I have not yet read these papers as carefully as I should, and would suggest a hearing at twelve o'clock, but I want especially to ask Mr. Vincent whether that is going to—

MR. VINCENT: That will be convenient, yes, your Honor.

THE COURT: —maybe create a problem. Will that be suitable, a hearing at twelve o'clock?

MR. VINCENT: Twelve o'clock will be fine, your Honor.

THE COURT: Well, we will have a hearing here at twelve o'clock. In this connection, before I picked up these papers this morning, a gentleman whom I see here in the court room [3] delivered to my chambers a letter addressed to me from the office of Senator Gravel. I was working on other matters when this letter came in, and I was unable to read it. I thought it might have to do with, if you will pardon the expression, an application for employment or something of that nature. I had not even picked up these papers at that point, and I just set it aside, but then I commenced reading this motion to quash the subpoena served on Dr. Rodberg and I have deduced, still without having opened the letter, that it must pertain to this matter.

MR. FISHMAN: That is correct, your Honor.

THE COURT: Now I would like, please, for you—because I don't see or haven't heard of your appearing for a party here—to state your name and also your interest.

MR. FISHMAN: If I may, my name is Charles Lewis Fishman. I reside at 63 East Capitol Street in Washington, D.C. I am the senator's private counsel, and a member of the bar of the District of Columbia, Superior Court, of the

District of Columbia, United States District Court for the District of Columbia, a member in good standing.

THE COURT: Well, I am happy to meet you and have you here. The question which comes to mind with respect to this communication which I have not yet opened is whether in your judgment it isn't the type of information that should be disclosed to [4] the parties to this matter simultaneously with disclosure to the Court. I am obviously reluctant to receive ex parte communications in any matter.

MR. FISHMAN: I have no objection to making the letter available to the government also. My instructions from the senator were to deliver the letter to you, since it states the limited purpose for which I appear.

THE COURT: Well, I am happy to have the letter, I am happy to receive it and will consider it, but on the condition that I have stated, that it be made available, or copies, not only to government counsel but to defense counsel as well.

MR. FISHMAN: I will be happy to do that, your Honor.

THE COURT: Well, on that understanding, between now and twelve o'clock I will read this communication which I have received, and I will look for you to attend the hearing if you wish.

MR. FISHMAN: At this point, your Honor, may I introduce cocounsel, Mr. Robert Reinstein of Philadelphia, the Temple University School of Law.

THE COURT: And does he represent Senator Gravel also as associate counsel?

MR. FISHMAN: Yes, your Honor.

MR. REINSTEIN: Yes, I do, your Honor.

THE COURT: And could you state Mr. Reinstein's bar affiliations?

[5] MR. REINSTEIN: I am a member of the bar of the Court of Appeals of Maryland, your Honor, and I am admitted to the Federal District Court of Maryland, United States Court of Appeals for the Fourth Circuit, and the United States Court of Claims.

THE COURT: And I take it that you are in good standing and that there are no disciplinary proceedings against you.

MR. REINSTEIN: That is correct, your Honor.

MR. FISHMAN: For the record, it is Reinstein, R-e-i-n-s-t-e-i-n.

THE COURT: All right. Thank you. Well, we will see you all at twelve o'clock, unless there is something additional to be mentioned at this time.

MR. REIF: Perhaps we ought to mention one thing, your Honor. That is that Miss Peterson and I are members of the bar of the state of New York and the United States Court of Appeals for the Second Circuit.

THE COURT: Members in good standing?

MR. REIF: Yes, sir.

THE COURT: And there are no disciplinary proceedings pending against either of you?

MR. REIF: No, your Honor.

THE COURT: That is true of you both. Well, I will welcome you all again at twelve o'clock.

MR. REIF: Thank you, your Honor.

[6] MR. VINCENT: Thank you, your Honor.

[The hearing was resumed at twelve o'clock noon.]

THE CLERK: Emergency Business Docket Number 71-172, United States versus John Doe.

THE COURT: I think it would be helpful again to have counsel state their names and the parties whom they represent. I have noted them but I don't know whether the stenographer did, and it should be done in connection with this hearing. So please, I will start again with Miss Peterson and Mr. Reif.

MR. REIF: Right. My name is James Reif, R-e-i-f, and I along with Miss Doris Peterson represent Dr. Leonard Rodberg.

THE COURT: All right. And I understand that Dr. Rodberg is seated at counsel table with you.

MR. REIF: That is correct, your Honor.

THE COURT: This gentleman here. Thank you. And then we have Mr. Vincent for the government, please.

MR. VINCENT: Yes, your Honor. My name is Paul C. Vincent, Attorney with the Department of Justice, Washington, D.C., and this is my colleague, Mr. Marple.

MR. MARPLE: John Marple, M-a-r-p-l-e.

THE COURT: Now I don't know whether Mr. Fishman wishes to appear or just be in the capacity of an observer at this juncture.

MR. FISHMAN: At this juncture, your Honor, my instructions [7] are simply to be present and observe the proceedings. Should the need arise, as indicated in the letter, I would then move to intervene. If you wish, I will enter the name in the record now.

THE COURT: It is strictly your option, Mr. Fishman. I am happy for you to do so or not, as you prefer.

MR. FISHMAN: Well, let me enter my name in the record now, your Honor.

THE COURT: Fine.

MR. FISHMAN: And hope that I won't have to proceed any further. My name is Charles Fishman, attorney in Washington, D.C. I am a member in good standing of the bar of the District of Columbia and accredited before the Superior Court of the District of Columbia, United States District Court for the District of Columbia, and the United States Court of Appeals, District of Columbia.

THE COURT: Whom do you represent?

MR. FISHMAN: I represent United States Senator Mike Gravel.

THE COURT: And your associate is Mr. Reinstein. Fine.

Well, I think at the outset I should mark as a hearing exhibit, Exhibit Number 1, Senator Gravel's letter to the Court dated August 26th, which you have shown to other counsel in the case, and that will be filed with the papers. The question I am considering at this juncture is whether to grant the petitioners' alternative request that they be afforded time [8] within which to file affidavits and mem-

oranda of law. If that leave is granted, I would plan tentatively, that is, subject to the positions stated by counsel, to have the hearing following the one on the 10th of September, which has been scheduled with respect to the application of the witness Dr. Falk.

I think I might first ask Mr. Vincent whether such a postponement of resolution of the questions raised would handicap his presentation of this matter to the grand jury.

MR. VINCENT: If your Honor please, the government would oppose any stay, basically because I think a pattern is now being set by this. This is the second witness who has come in, or the third witness, petitioning for the same relief, and I think that these stays, your Honor, if the pattern continues, starting with the one last week, will unnecessarily impede and delay the investigation now being conducted by the grand jury.

I might note also, your Honor, that the issue here I think is so simple. It is to quash a subpoena. It has nothing to do yet with proceedings before the grand jury. This is merely an attempt to prevent an appearance. I believe, your Honor, that the proper forum for the determination of any of these questions must start inside the grand jury room. If there is any privilege to be claimed, whether it be the First Amendment, the Fourth Amendment, the Fifth Amendment, legislative privilege, as apparently is being done here, I do not think that briefs, affidavits, and memos of law can possibly anticipate particular [9] questions, and I think what would happen, your Honor, is, it would delay the proceedings indefinitely, witness after witness getting a stay, pushing this into the winter and the early part of next year, if the pattern continues. I am assuming that, your Honor. That is an assumption. Then we get into the grand jury room; if a question is asked and the privilege is taken, we would be back before your Honor on the very same point.

I believe, your Honor, that ad mimine the witness should and must appear before the grand jury for any intelligent determination as to whether or not any privilege claim is properly taken.

THE COURT: Well, now I will hear Mr. Reif.

MR. REIF: Thank you, your Honor. Addressing myself to Mr. Vincent's remarks, first of all, I am not familiar with any pattern to which he refers. We represent only Dr. Rodberg in this matter. I am familiar with Mr. Falk's position, and that is as far as we are familiar with the grand jury proceedings.

As to raising questions subsequent to appearance, it is our position that it is the appearance itself which should be avoided, not merely answering specific questions, so that we do not feel that appearing and declining to answer certain questions will in any way deal with that specific problem.

As to the particular matter in this motion, we raise at this time four questions, one of which is, as far as I know, [10] quite different from any of the points raised by Mr. Falk, and that is, I am specifically referring to the question of Dr. Rodberg's relationship with Senator Gravel. As to that question, I believe it raises substantial questions, as we have tried to show briefly in our moving papers, and I do believe that a memorandum of law would be quite helpful in resolving the issue.

As far as I can determine from what research I could do in the last day, the number of cases on the scope of the speech and debate clause is quite limited and the questions as to its scope are at this point quite undefined. I believe further that it will be necessary, in providing the Court with a precise notion of what claim it is that is before the Court, that an affidavit from Senator Gravel would be quite helpful in defining that relationship.

As to your Honor's suggestion as to September 10th, which I believe is two weeks from today, although I am forced to go to Maine next week for a few days, I do believe that we would be able to be prepared at that time, both with the affidavits and with the memorandum of law.

THE COURT: Let me ask you a question, Mr. Reif, about one aspect of the motion, and that has to do with the allegation that the subpoena and any questions that would be addressed to Dr. Rodberg in the grand jury would

be the product of an unlawful electronic surveillance. I have already ruled in the [11] first of these three cases to come before me, which had to do with the application of a witness named Popkin, that a bare allegation, in my opinion, of a violation of the laws dealing with wiretapping and electronic surveillance is insufficient to occasion an Alderman type hearing.

I see here a paragraph in Dr. Rodberg's affidavit about his information and belief that he has been the subject of unlawful electronic surveillance. If this ground of your motion is to be preserved, you will have to elaborate on that allegation at this time. I will follow the same procedure in this case as I did in this regard in the case dealing with Dr. Falk. His counsel elaborated on the allegation and outlined the type of evidence they anticipate producing, but in affidavit form. Papers in that matter I think are to be filed on the 8th of September. What do you have in mind, if anything?

MR. REIF: At this time, your Honor, we are not prepared to submit an affidavit which would show, say—

THE COURT: I don't mean an affidavit. What do you think you will establish, if anything, by way of unlawful electronic surveillance?

MR. REIF: At this point, your Honor, we are entirely uncertain as to that, and at this point it is substantially merely the allegation.

THE COURT: Well, do you know what if anything Dr. Rodberg had in mind in Paragraph 10 of his own affidavit when he says [12] on information and belief he had been the subject of unlawful electronic surveillance?

MR. REIF: Well, as I say, at this point it is a suspicion that we have based upon our knowledge as to certain people with whom Dr. Rodberg has been in contact, but as to specific facts, we cannot point to any at this point.

THE COURT: Well, let me just make it a little clearer. What I am contemplating doing is restricting the stay, if I grant it, to a consideration of specific points, and I will exclude this allegation of unlawful electronic surveillance

unless you have something that at least you are going to – unless you have something now in mind. I am not looking for proof now. I am just endeavoring to ascertain whether the allegation is not so much on information and belief but just a suspicion.

MR. RIEF: Well, I think, to be frank, that there is, as I say, no concrete fact which we can point to. Our belief is founded upon the fact that Dr. Rodberg has been in telephone communication with certain people and has used the phone of certain people whom we believe their phones have been–

THE COURT: Whom you suspect.

MR. REIF: Right. That is correct.

THE COURT: If you wish, you may talk to Dr. Rodberg right now to see if he has anything in mind specifically, because he says here in his affidavit, "Upon information and [13] belief, I have been the subject of unlawful electronic surveillance," so if he has, I would like to determine the extent of his information and belief if it is different from what you have just stated. So why don't you talk to to him for a moment and see whether he has more in mind than you have stated.

MR. REIF: Thank you, your Honor.

[Counsel conferred with Dr. Rodberg.]

MR. REIF: Your Honor, at this time we have nothing beyond what I have just stated.

THE COURT: Well, the subpoena calls for Dr. Rodberg's appearance this morning before the grant jury, and I will, over the government's objections, grant a stay until after the hearing on September 10th. However, I do not grant the stay in order that there may be additional information filed with respect to unlawful electronic surveillance. That will not be the subject of the hearing on the 10th of September. Having no more than a mere general suspicion, that is not a proper basis for a stay of this subpoena, in my view, and that issue is eliminated from this application, and that is my ruling. I deny the motion for a stay to the extent that it is based upon a general, unspecified allegation of unlawful electronic surveillance.

I do, however, grant the motion in order that the parties may file affidavits and memoranda of law on the other points raised in the motion, that is, the First Amendment rights of [14] the prospective witness and the other First Amendment rights, and other rights, including any right of congressional privilege, which may be here involved. So that those other aspects of the motion are the basis for the Court's order, but only those aspects.

MR. REIF: Would your Honor entertain a brief argument on the surveillance question?

THE COURT: Well, I am aware, let me say, of the cases in the District of Columbia and in the Third Circuit and the California cases. I went into this in some detail in connection with the Poplin matter. Counsel furnished the Court with copies of the lengthy opinions in the Third Circuit and the District of Columbia cases, and I have read them, so if you think there is something that should be added to that, I will hear you briefly.

MR. REIF: Well, no. I was not aware that your Honor had been made aware of those opinions.

THE COURT: Yes. You see, this problem has been written about so comprehensively by the judges in the other circuits that I really made up my mind on the basis of studying those opinions.

MR. REIF: In light of that, I—

THE COURT: So I think that my ruling will stand on that aspect of it.

MR. REIF: All right.

[15] THE COURT: Now let me state why I feel that I should order this stay over the objections of Mr. Vincent. I believe that the grounds asserted in this motion are different from the grounds asserted in the applications heretofore filed on behalf of the witnesses Popkin and Falk, and that therefore, there is no real basis for believing that there is a sort of a pattern followed here, or sought to be followed, by the witnesses and by their attorneys. Mr. Reif apparently was unaware of these prior applications.

I think also that while the issue at the moment is simply the grand jury's right to compel the presence of the persons before the grand jury, the briefs that will be filed and the affidavits that will be filed and the argument made on September 10th will apply almost equally to questions that may arise during the course of the grand jury interrogation, so that I think it is best to get briefs from the parties at this juncture so as to be able to rule without protracted delay should disputes arise during the course of their testimony. So that it seems to me that time within which to brief these questions is positively required at some stage, and I would rather that these matters be briefed at this juncture rather than at some possible later time.

Please have in mind that the issue at the moment is the power of the grand jury merely to compel the presence of Dr. Rodberg before the grand jury, but in your briefs, please [16] cover the law, to the extent that you can find it, on the right of the grand jury to put to the witness the questions that you anticipate will be put. In other words, make your briefs somewhat broader than the narrow issue that is faced at this juncture. I assume that you had that in mind, in any event.

As far as the time is concerned, I think I ordered the briefs in the falk matter to be filed on the 8th of September. I am not sure of that. It was either the 7th or the 8th. I believe it was the 8th.

MR. VINCENT: It was the 7th.

THE COURT: Was it the 7th?

MR. VINCENT: Yes, your Honor.

THE COURT: Well, here we will make it the 8th, because you won't have quite as much time, and this hearing will not be joined with the hearing on the Falk application, but it will follow immediately thereafter. There are separate questions. The Falk hearing is set for the 10th, at ten o'clock, and this would follow immediately thereafter, probably at 11 or 11:30, or whenever. So affidavits and briefs on the law in this matter are due on or before September 8th and the hearing will be on the 10th.

Now does anyone wish to be heard further? I will be with you in a moment, Mr. Fishman. But first, do counsel for either of the parties wish to be heard further or ask any–

[17] MR. VINCENT: I have no questions, nothing further, your Honor.

MR. REIF: We have nothing further, your Honor.

THE COURT: Well, now I think Mr. Fishman wished to address the Court.

MR. FISHMAN: If I may for just a moment, your Honor. We are obviously in a bit of a quandary here in the sense of determining what role we would want to play on the 8th. As the senator indicated to you in his letter–

THE COURT: Could I see that letter again, please?

[Exhibit handed to the Court.]

THE COURT: Thank you.

MR. FISHMAN: Particularly in the third and fourth paragraphs, if the purpose for which Mr. Rodberg has been subpoenaed involves violation of anyone of potential federal law, whether it be bank robbery or anything else, his interests are not involved and he would not wish to participate. If, on the other hand, the issues to be raised and decided at that hearing and before the grand jury related to his activities in the performance of his duties as a United States Senator and those of his personal entourage, he then obviously has a very substantial interest of his own which he wishes to assert.

The subpoena in this matter is totally devoid of any information to indicate the issue before the grand jury or the purpose or purposes for which they are calling Dr. [18] Rodberg. It therefore leaves us in the position where we are totally without any intimation at all to make a determination or even a guess as to whether or not we should be prepared to participate, and, if so, to what extent.

There apparently is some assumption on the part of counsel here that it may relate to these matters. I prefer not to engage in such guessing games, and I believe that as a matter of due process, the senator has a clear right

to know at this point, so that he may prepare and may make that decision, just what the issue is before the grand jury and what the general nature of the questions are going to relate to in terms of subject matter.

THE COURT: Well, it would seem to me, although this is for you and the senator to decide, that you will have to either— well, you will have to file some sort of motion in the case. You have got to file some sort of pleading directed to protect the interests of the senator which you described. I am happy to have you here as an observer, but I am not prepared to and will not rule on any requests or motions or other points that you riase unless they are based upon some sort of written application or some participation as a party.

I don't think this is a type of matter that invites participation of anyone that says he is an amicus curiae. You are here with a specific interest to protect. Perhaps you feel that it will be protected by counsel for Dr. Rodberg, [19] perhaps you don't, but I won't rule in the course of just discussing the problems or possibilities in general terms. You have got to decide whether to intervene or not, or whether to seek to intervene.

MR. FISHMAN: I might say, your Honor, that we were pained all day yesterday trying to ascertain just what our role should be, and I had several discussions with the senator at the time, and I go back to the problem that I suggested at the beginning of my remarks. If we should, for instance, move to intervene and then it is determined that the issue before the grand jury for which Dr. Rodberg has been subpoenaed has nothing to do with the senator, then we have no interest or right to be there. If, on the other hand, the questions for which the grand jury has subpoenaed Dr. Rodberg do relate to the senator's activities, then we want to be very vigorous in our representation.

I therefore find myself in a position where I am not sure which is the cart and which is the horse, to know which to put before the other, should I move to intervene at this point, which I have the papers before me to do if

necessary, and I am in the position of intervening before I know what I am intervening in.

THE COURT: Well, really, I cannot help you in the matter beyond what I have said. I will be happy to pass on anything that you decide to file, or to rule on motions or applications [20] of any sort, but it is up to you. And let me say this, or suggest this: that this is something you might wish to give further consideration to. I have already indicated that there are no final rulings in these matters to be made today. The Clerk's Office is happy to receive whatever you have, but I would think that you might give the matter further consideration. There is no compulsion on you, as I see it, to act or decide what to do today.

MR. FISHMAN: Well, except that, your Honor, if we do decide to intervene, would your Honor be disposed to rule and order the District Attorney, or the U. S. Attorney, rather, to disclose the purpose for which the grand jury has subpoenaed Dr. Rodberg, so at that point we can determine whether or not we wish to participate on the 8th?

THE COURT: That is not before me now. That is too iffy. You have got to make the first step here, either by intervening or not intervening, and when you have made up your mind, I will hear the matter.

MR. FISHMAN: In which case, your Honor, I will now move to intervene in the matter.

[Document tendered to the Court.]

THE COURT: Thank you. You have got to hand copies to—

[Documents tendered to counsel.]

THE COURT: Do you wish, Mr. Vincent, to be heard with respect to this motion to intervene?

[21] MR. VINCENT: Your Honor, the government objects to the motion to intervene, primarily on the grounds that the senator is not under subpoena, the grand jury has not called him as a witness before this grand jury. This motion is based on pure supposition that Senator Gravel — and I might say, through the eyes of any other senator,

any other Congressman – would intervene at will when any witness has testified before a grand jury. I say that the time for the senator to raise his privilege and protect his rights is when he is under subpoena if he is in fact ever under subpoena before this or any other grand jury.

I think here again, your Honor, that this is a motion made certainly in good faith, and, with all due respect to counsel for the senator, I do not think it is properly taken. The witness who is subpoenaed has alleged that he is a member of the staff of Senator Gravel. I notice that the senator uses the term that Mr. Rodberg is a personal servant of the senator. Now, if a senator or a congressman has the right in any case to intervene just because one, either his servant or his staff member has been issued a subpoena, I am afraid that we would definitely clog the wheels of justice in grand jury proceedings and in any court proceedings.

I think we need more than suspicion and conjecture that interests of Senator Gravel are involved.

THE COURT: Let me ask whether you have any authority on this proposition.

[22] MR. FISHMAN: Yes, I do, your Honor.

THE COURT: I am considering taking this motion for leave to intervene under advisement and looking at some cases myself. Have you had an opportunity to prepare any sort of memorandum in support of this motion?

MR. FISHMAN: Your Honor, I returned to Washington–

THE COURT: I can see that you haven't. Now query, I don't know whether I would take this– well, I am thinking that you might submit a brief memo of law on this point unless you have all the cases before you that you wish to rely on.

MR. FISHMAN: Well, if I may make a point or two, your Honor.

THE COURT: Yes.

MR. FISHMAN: The motion clearly lays forth the fact that the rights being asserted here are not those of Dr. Rodberg but those of the senator. The privileges which we

are asserting under the speech and debate clause are those of the senator as well as those of Dr. Rodberg. Indeed, I cite your Honor to Jefferson's Manual, which, of course, is the guilding light for interpretation of these matters, at Section 287, which deals with the privileges of members of Parliament, and it notes specifically there that the privilege extends to the member, that they are at all times exempt from questioning elsewhere for anything said in their own houses, and that during the time of privilege, neither a member, his staff, [23] nor his servants for any matter of their own may be arrested, and it goes on to point out other things, nor impleaded, cited, nor subpoenaed in any court. I will leave that to your Honor to take a look at. But it clearly delineates the distinction of the privilege between a senator or a member of the Congress and his servants. Each has the privilege, each to assert for himself.

[Book tendered to the Court.]

MR. FISHMAN: Also, in the case of United States versus Johnson, at 383 U.S. at page 173 through 177, the court notes there that in a criminal prosecution, that the evidence which the government introduced, which eventually was the reason that the court threw out the charges, because the evidence was protected by the speech and debate clause, extensive questioning concerning how much of the speech was written by Johnson himself, the congressman, how much by his administrative assistant, and how much by outsiders representing the loan company, and the court went on there to suggest that the pervasiveness of the questions with respect to both the congressman and his assistants, and his assistants, violated the speech and debate clause, so the right we are asserting here is clearly that of the senator. That right is not adequately protected, we maintain, by Mr. Rodberg or by the government.

THE COURT: Well, I am just not going to rule on this aspect of it at this time.

[24] I will hear Mr. Vincent briefly. I saw you half rise as if to respond, but I think that I wish to consider this matter further. I think that Mr. Fishman and associate counsel should file a brief memo in support of this right.

I think it would be helpful. I don't think you need until the 8th of September, however. When do you think you could have it in my hands, a memo discussing some of these principles to which you allude?

MR. FISHMAN: One moment, your Honor.

[Mr. Fishman conferred with Mr. Reinstein.]

MR. FISHMAN: One week, your Honor?

THE COURT: Well, let's see.

MR. FISHMAN: We are right back, of course, in the same box again.

THE COURT: Excuse me. What we will do is make it the same day, because I won't be here a week from today, so I won't see it before the 8th.

MR. FISHMAN: When will your Honor be leaving? Maybe we can get it to you before then.

THE COURT: On the second. In other words, the day before. However, I would need to see it— it would have to be filed on the first of September, Wednesday, for me to consider it, and at that it would have to be before two o'clock.

MR. FISHMAN: We will file it. We will make every attempt to file it before then, your Honor.

[25] THE COURT: All right. And I will take that aspect of this under advisement until then.

MR. VINCENT: If I may.

THE COURT: Yes.

MR. VINCENT: If I may, if your Honor please, does the government have the right to or do you desire the government to file a memo at the same time on September first before two o'clock?

THE COURT: Yes indeed.

MR. VINCENT: Even though we cannot reply directly to the citations and cases and law which will be in Mr. Fishman's brief, but the government will file an opposition, your Honor.

THE COURT: Fine. Yes.

MR. REIF: I should like to state for the record, your Honor, that Dr. Rodberg does not oppose the motion by

Senator Gravel. Actually we welcome it, and we think it will be helpful.

THE COURT: Well, I think— Yes, Mr. Fishman.

MR. FISHMAN: If I may raise one more point, your Honor, if it is possible for your Honor to hear argument on Wednesday, in the early afternoon or late morning.

THE COURT: Well, it would be possible, but I would rather read your cases than hear you talk about them, actually.

MR. FISHMAN: What I was thinking of, your Honor, is the need for some ruling so we could ascertain the purpose for [26] which the grand jury has called Dr. Rodberg, in time to prepare a second memo that your Honor has asked for for the eighth.

THE COURT: Well, I think they are distinguishable. The question of whether the senator can intervene is the one raised by this motion. If he is permitted to intervene, of course he will participate in the hearing through you, in the hearing on the tenth. You will have between the first and the tenth of September in which to prepare.

MR. FISHMAN: What I am suggesting, your Honor, is that preparing, as far as we are concerned, requires some knowledge as to the purpose and scope of the grand jury, which is not disclosed in the subpoena.

THE COURT: But there is a distinction. Let's assume you are permitted to intervene, hypothetically.

MR. FISHMAN: Yes, your Honor.

THE COURT: You then seek a court order requiring the government to, let's say, outline the subject matters of the grand jury interrogation, but the fact that you seek it is no different from the request of the witness here, that is, the prospective witness, Dr. Rodberg; he is seeking the same thing. So that issue is going to be considered on the tenth, whether it is sought on behalf of your client or on behalf of the witness. That is one of the principal points raised by Mr. Reif and Miss Peterson in their motion.

So I surely will not previous to the 10th of September order the government to make any specification of what

the subject matters will be. That is going to be one of the questions debated on the 10th of September, whether the Court should enter such an order, so you won't get that, in any eventuality, until the 10th of September.

Perhaps there are still some matters that are not a hundred percent clear, but that may be in the nature of the problem.

We will recess in this case at this time.

[Thereupon the hearing was concluded.]

VOLUME 2

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

UNITED STATES OF AMERICA)
)
v.)
) EBD 71-172-G
JOHN DOE)
)

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 2, Federal Building, Boston, Massachusetts, on Friday, September 10, 1971.

APPEARANCES:

Paul Vincent, Esq., Attorney,
Department of Justice,
appeared for the government.

James Reif, Esq.,
Doris Peterson, Attorney, and
Martin Stavis, Esq.,
appeared for Leonard Rodberg.

Joseph Bartlett, Esq.,
Herbert Reid, Esq.,
Robert Reinstein, Esq., and
Charles Fishman, Esq.,
appeared for Senator Mike Gravel.

[2]

PROCEEDINGS

THE CLERK: Emergency Business Docket No. 71-172, United States Versus John Doe.

THE COURT: The Court will take under advisement the motion filed on behalf of Professor Falk, and I will reserve decision on that at least until after hearing the arguments in this matter, perhaps over the weekend.

I will ask, please, that counsel begin this hearing similarly as did counsel in the prior hearing, by identifying themselves and associates seated at counsel table with them for the purposes of the record.

Yes.

MR. BARTLETT: If your Honor please, my name is Joseph Bartlett. I am a member of the law firm of Ely, Bartlett, Brown and Proctor, in Boston, Massachusetts. I act on behalf of Senator Mike Gravel in the matter as local counsel.

Reading from my left, Senator Mike Gravel, Senator from Alaska; Professor Herbert Reid, a member of the bar of the Commonwealth of Massachusetts, Professor of Law at Rutgers; Professor Robert Reinstein, a member of the Maryland Bar; and to my immediate right, Attorney Charles Fishman, of the District of Columbia Bar. Prof. Reinstein and Prof. Reed will be arguing the matter on behalf of our client, your Honor.

THE COURT: Well, will they both argue for the same client or–

[3] MR. BARTLETT: With your Honor's permission, I would like Prof. Reinstein to explain.

THE COURT: All right.

PROF. REINSTEIN: Our intention, your Honor, is that I would make the initial argument and Prof. Reed will give the rebuttal argument.

THE COURT: Are there any other counsel?

MR. REIF: Your Honor, my name is James Reif, and along with Doris Peterson and Martin Stavis, we represent Dr. Leonard Rodberg in the matter. At a previous hearing, your Honor granted leave for us to present Martin Stavis ad hoc. He is a member of the bar of the states of New York and New Jersey and the Supreme Court of the United States. He is a member in good standing of those bars, and there are no disciplinary proceedings pending against him.

THE COURT: What is his name?

MR. REIF: Martin Stavis. He will be here shortly.

THE COURT: And then will you please do it again for the government.

MR. VINCENT: Yes, your Honor. Paul Vincent, Department of Justice, Washington, D.C. My colleague is John Marple, also of the Department of Justice.

THE COURT: All right. I think first—will it be Mr. Reif who will be speaking on behalf of Dr. Rodberg?

MR. REIF: Your Honor, it is our intention that I will [4] argue in chief and Mr. Stavis will handle any rebuttal.

THE COURT: Well, being the moving party here, I think I should hear you on behalf of Dr. Rodberg before hearing counsel on behalf of the senator, because the senator is intervening here, you see.

MR. REIF: I understand that.

THE COURT: Unless you have a preference. If you have worked it out among yourselves, I am happy to abide by any order that you have agreed on.

MR. REIF: The attorneys for Senator Gravel have expressed preference in their going first, and we believe, in view of the fact that they raise primarily one issue before the Court, we raise the second and additional issue that they would be—in the best interests of efficiency that they proceed first.

THE COURT: Well, that is certainly agreeable, and I will hear counsel.

MR. VINCENT: If your Honor please, before counsel begins, I would like to hand up some papers to the Court and give copies to opposing counsel.

THE COURT: All right.

MR. VINCENT: The first document, your Honor, is the government's written opposition to the intervenor's motion to quash the subpoena. The second document is a certification from the Financial Clerk of the United States Senate. The third item, your Honor, is an extract from Public Law 601.

[5] (Documents tendered)

THE COURT: All right.

MR. REINSTEIN: Your Honor, at this time we have filed with the clerk two affidavits, one of Senator Gravel and one of Robert G. Dunphy, who is Sergeant at Arms of

the United States Senate, both of these affidavits testifying to the employer-employee relationship of Senator Gravel and Dr. Rodberg. Copies have heretofore been given to Mr. Vincent.

THE COURT: All right. I am happy to receive all of those papers.

MR. REINSTEIN: May it please the Court. Senator Gravel has intervened in this proceeding in order to protect his constitutional rights under the speech and debate clause. We filed a motion to quash the subpoena to Dr. Rodberg on the basic ground that any interrogation by the federal grand jury of a personal staff assistant of a member of Congress which inquires into the legitimacy of the official conduct of that member is unconstitutional and prohibited by the speech and debate clause.

THE COURT: Excuse me, right at the very outset. Let me get one thing clear. I wasn't absolutely clear from the briefs and so forth whether Prof. or Dr. Rodberg was a member of the senator's personal staff or a member of the staff of a subcommittee.

MR. REINSTEIN: Your Honor, Dr. Rodberg is a member of the [6] personal staff of Senator Gravel.

THE COURT: All right.

MR. REINSTEIN: Dr. Rodberg's affidavit has already testified towards that. We filed Senator Gravel's affidavit in which Senator Gravel deposes and says: "That Dr. Leonard Rodberg is and has been since June 29, 1971 a member of my personal staff in the United States Senate."

THE COURT: All right.

MR. REINSTEIN: The affidavit of the Sergeant at Arms or the United States Senate, Mr. Dunphy, says: "By letter to me dated June 29, 1971, Senator Gravel designated Dr. Leonard Rodberg as a member of his personal staff." Mr. Dunphy then goes on to quote the letter from Senator Gravel.

THE COURT: Well, thank you. What was on the 29th of June? Was that the day before, the day after, or the evening of, or do you know, what, the senator's quoting from the so-called Pentagon Papers?

MR. REINSTEIN: The letter was sent on the same day. It was many hours prior to the senator's disclosing the Pentagon papers at a subcommittee hearing.

THE COURT: All right. Thank you.

MR. REINSTEIN: That was also on June 29th.

There are, your Honor, we think, two basic facts which really can't be disputed in this proceeding, and those facts form the basis of our contentions here. The first fact is [7] Dr. Rodberg is a personal assistant to Senator Gravel. We have supported that in Dr. Rodberg's affidavit, the affidavit of Senator Gravel, and the affidavit of the record keeper of the United States Senate, the Sergeant at Arms, Mr. Dunphy. We see for the first time a notation on the letter from the Financial Clerk of the United States Senate claiming that "The above listed individual is not employed on the rolls of the Senate."

With due respect—of course, putting to one side the fact that this letter is not in affidavit form—with due respect, the Sergeant at Arms and not the Financial Clerk is the official record keeper of the United States Senate, and it is clear that any financial conditions which the senator has with his personal staff are set by the senator himself and cannot be inquired into by the Senate itself, and especially by the judiciary. I suppose in essence what the government is claiming, if it wishes to dispute this fact, is that Senator Gravel comes here and is practically attempting to impose a fraud on this Court.

THE COURT: Well, let me say this, please: I haven't even seen the document you refer to filed by the Clerk. Did you hand it up to me?

It must be here. It was just handed up.

MR. REINSTEIN: Your Honor, I have additional copies.

THE COURT: No. There is no need for another copy if it [8] is here.

Oh, yes. Mr. Dunphy's affidavit. Here is Senator Gravel's affidavit, and then for the government we have a letter from Deputy Assistant Attorney General Holtzman and an extract from the Public Law. I don't see the reply.

Oh, I am sorry. The reply is in the stamp.

MR. VINCENT: Yes, your Honor.

THE COURT: Oh, yes. And here is the stamp of the Financial Clerk. Well, at least I know to what you are referring, so please resume.

MR. REINSTEIN: Yes, your Honor. The only other point I would like to make is that when we filed our motion to intervene, we alleged in our motion that one of the bases for it is that Dr. Rodberg is a personal staff assistant of Sen Senator Gravel. That was not challenged at that time by the government. Instead, the government proceeded in its arguments upon the assumption that he was instead a staff assistant—

THE COURT: Let me say this at the very outset: The Court will proceed on the assumption and on the finding that Dr. Rodberg has since June 29th been a member of the personal staff of Senator Gravel, so that is that.

MR. REINSTEIN: Fine, your Honor. The second undisputed fact on the record of these proceedings is that the grand jury has called Dr. Rodberg in order to interrogate him about the legality of Senator Gravel's actions in disclosing to his [9] colleagues in the Senate and to his constituents the Pentagon Papers during the hearing of the subcommittee and subsequent thereto. This is undisputed because the government, first of all, has not denied it. In its brief, the government says it will neither affirm nor deny it.

The government then proceeds to make arguments which take up the bulk of its brief on the speech and debate clause points on the assumption that this allegation is indeed true.

The only statutes which the government has referred us to were in its brief in opposition to our motion to intervene, and those statutes are, of course, the so-called Espionage Act, which was used to indict Dr. Ellsberg with respect to the Pentagon Papers.

Not only is the fact that the grand jury intends to interrogate into the legitimacy of Senator Gravel's actions undis-

puted by the government; it is also uncontradicted in that sense, and that is the premise which forms the legal basis of all the government's arguments.

The basic argument of the government is that Senator Gravel himself can be subpoenaed by the federal grand jury and interrogated concerning what he did on June 29th in disclosing the Pentagon papers. This was also the legal premise underlying the opposition of the government to our motion to intervene, in which they said that Dr. Rodberg had adequate protection.

[10] Finally, I think it is not an exaggeration to say that the necessary message of the government's brief is that there is a strong possibility that the next subpoena will be issued to Senator Gravel himself. I say this because of the comments in the brief concerning Senator Gravel's so-called obligations as a citizen to cooperate with the grand jury and, if he has anything to hide, to exercise his Fifth Amendment privilege.

Given all of those arguments, I think that Justice Harlan's apt description of another case is applicable. On the basis of these undisputed facts, we do not see how it can be legally maintained that the disclosure of the Pentagon papers by Senator Gravel was not part of the official conduct of a member of Congress for which he is immune from any criminal proceedings and any judicial inquiry in criminal proceedings under the speech and debate clause.

THE COURT: Let me just interrupt to say, setting the question and framing the issues, I don't consider this as as subpoena directed to the senator. You say there is this possibility. Well, I just don't know one way or another about any such possibility of a subpoena being directed to Senator Gravel. There is certainly nothing in the record that would indicate that that is contemplated, beyond what you have mentioned. We have, however, before us this morning a particular motion with respect to a particular subpoena, so please focus on the subpoena to Dr. Rodberg, I know that there are many similar [11] factors and arguments involved, but I certainly cannot treat the matter as a motion to quash a possible subpoena directed to the senator.

MR. REINSTEIN: I am sorry, your Honor, if I didn't make our position clear. I was addressing myself to the subpoena towards Dr. Rodberg.

THE COURT: Right.

MR. REINSTEIN: It is our contention that one of the single undisputed facts is that not only was Dr. Rodberg Senator Gravel's staff assistant, but also that this subpoena is designed to interrogate Dr. Rodberg concerning official actions of Senator Gravel in disclosing the Pentagon papers. We are protecting Senator Gravel's privilege to be immune to judicial inquiry by the interrogation of a staff assistant.

THE COURT: Let me just ask one or two questions to narrow it even further. Suppose hypothetically that questions put to Dr. Rodberg had to do only with matters previous to June 29th. Suppose they related to events ending the 28th of June. Would your position be different in respect to those questions?

MR. REINSTEIN: Certainly, your Honor.

THE COURT: In other words, your position, if I understand it, relates to matters that happened on and after the 29th of June. Is that correct?

MR. REINSTEIN: Yes, your Honor. Our position is that [12] Dr. Rodberg has been a staff assistant of Senator Gravel since the 29th, and as a staff assistant he necessarily engaged with Senator Gravel in privileged communications, and that these matters cannot be inquired into by the federal grand jury.

THE COURT: Do you draw any distinction between the types of activities of Dr. Rodberg? And here it seems we have three types of activities: First, the senator's quoting from the papers and his placing them in the subcommittee file, and then, I gather from the affidavits and briefs, his arranging for their possible publication. I don't know quite how to characterize that last aspect of the matter, but it is implicit here in some of the papers or exhibits attached to affidavits that Dr. Rodberg may have negotiated with possible publishers of some other papers, or something of that nature.

Do you draw a distinction in your own mind between the applicability of the Senator's privilege to those three types of activities, or are they all on a similar footing as you see it?

MR. REINSTEIN: We think, your Honor, that they are all covered by the speech and debate clause, and that any actions of Dr. Rodberg which were taken at the direction of Senator Gravel and in assistance of Senator Gravel in those activities are therefore also privileged under the clause. We say that because the Supreme Court has emphasized from the beginning that the speech and debate clause is to be construed broadly. [13] It does not simply apply to a speech or debate on the floor of Congress.

As your Honor knows from the case law, as early as 1881, Kilberg versus Thompson, the Supreme Court held that the clause also covers resolutions, votes taken, actions done in committee, and, finally, the broadest category anything generally done in a session of one of the houses by its members in relation to the business before it.

Essentially what we have here, your Honor is a speech by the senator given in committee critical of executive conduct in foreign policy. The speech was given in order to inform his colleagues and his constituents of how this country became involved in a rather disastrous chapter of American foreign policy and what lessons could be drawn to terminate this involvement. It was all part and parcel of a continuing debate that has been going on in the Senate over the foreign policy of the United States, and in particular how to terminate the conflict in Indo-China.

We see no distinction at all between the committee hearing putting it in the record, and the subsequent republication, because all of those fit into the category of things which are generally done by a member of the house in relation to the business before it.

THE COURT: Please elaborate a little on what you mean by the subsequent publication, because I was reluctant to state what you believe to have been done. You can state as much or as little as you wish, but what do you

have in mind? We are talking about what, the arrangement with the publisher for publication, or what?

MR. REINSTEIN: Well, first, placing the Pentagon papers in the official record of the subcommittee.

THE COURT: That I am clear on. I am talking about this, what I call the third phase of the—

MR. REINSTEIN: And then arranging for the printing of the record of the subcommittee to be distributed to the public at large.

THE COURT: And this is not now through the Congressional Record obviously, it is through private publishers.

MR. REINSTEIN: Yes, your Honor, just as most of us in this courtroom, of course, are on the mailing list of congressmen and very frequently we get mailings from congressmen which contain republication of speeches they made in Congress. It is the traditional method of disseminating what the congressman did.

Congressional Quarterly has very limited distribution, as does with all due respect to Senator Gravel, the record of the subcommittee. The Executive Branch makes what we consider to be a highly unusual suggestion in their brief that no privilege attaches to Senator Gravel and therefore, of course, no privilege attaches derivatively to Dr. Rodberg, because they [15] make an unsupported allegation in their brief that the committee hearing that was held was somewhat defective.

We think, your Honor, with all due respect, that this suggestion from the Executive cannot be entertained for three fundamental reasons: First of all, there has been no proof at all offered of any irregularity in the committee hearing. No resolution was taken by the main committee holding the hearing illegal. No resolution was introduced, no resolution was passed by the Senate doing so. Furthermore, the only action that I know of that occurred in the Senate, if this Court is going outside the door, is that Senator Dole, who is, incidentally Chairman of the Republican National Committee, moved that an investigation be held of Senator Gravel's subcommittee hearing, with the possibility

of censure or other disciplinary action, and that this motion failed for want of a second so far as the Senate is concerned.

THE COURT: Well, before you leave that, I would like to turn—I thought there was a somewhat broader statement made in the government's brief on that. I thought there was some reference to the action of the subcommittee being in some fasion disavowed by the Senate, something along that line.

MR. REINSTEIN: That has never occurred. There is no proof in this record that it did.

THE COURT: Well, maybe that isn't what was stated; but there is something here along those lines, and I would like to know what it was if you can put your finger on it.

MR. REINSTEIN: Perhaps your Honor is referring to page 10 of the government's brief.

THE COURT: Well, let's see. Yes, it was at the very bottom of the page. It says the Senate has disclaimed official sanction for this action. I wondered what the nature of this disclaimer was.

MR. REINSTEIN: Your Honor, I know of no disclaimer. I can say with absolute reliability on this statement that the main committee issued no disclaimer of Senator Gravel's action and the Senate itself has taken no action against him. All I can see here in reference to it is a clipping from the Washington Post of August 18th, which I believe referred to the comment, the alleged comment, of the senator that he was dissatisfied with what Senator Gravel did.

THE COURT: All right. Well, please resume.

MR. REINSTEIN: Yes. Secondly, your Honor, even if the hearing itself were somehow illegal, we think the case law makes clear that this would not defeat the congressional privilege. In the Kilbourne case itself, the Supreme Court found that the hearing and the resolution of the congressional committee were not only illegal, they were without jurisdiction, they were unconstitutional. Nevertheless, the Supreme Court held that the congressional privilege means what it says. Similarly, in Tenney against Brantove, you have a situation of [17] unconstitutional action taken by

the committee, and those members were also held in—The same is true of Dombrowski and Eastland, and Powell versus McCormack. Those are the only four cases to come up to the Supreme Court in the context of committee hearings.

In each case, there was a finding of illegality of the hearing or the action taken by the committee, and in each case the senators were found immune. Obviously the immunity provisions would mean nothing if they only applied to illegal acts.

Thirdly, your Honor, even if the subcommittee hearing were viewed in the worst possible light, and that is an unofficial press conference, we think the Supreme Court has made clear that that too would be covered by the congressional privilege. We think this is settled by the two cases of Barr versus Matteo and Howard versus Lyons. As your Honor will recall, those cases involve subordinate officials of the Executive Department issuing press releases in one case and in another case, the Howard case, circulating those released and republishing them, and these press releases defamed certain friends of the official, and in one case their names were referred to Senator Joseph McCarthy for possible action.

The Supreme Court held that communications of that sort in the form of press releases to the public and to Congress itslef was part of the official duty of subordinate officials [18] in the Executive Department. That being settled, surely if Mr. Barr and Captain Howard, only a captain in the United States Navy, had an executive privilege, which is judicially created and not even set out in Article II of the Constitution for the issuance of press releases, it seems clear that a United States senator, one of whose primary obligations is to communicate with his constituents and his colleagues over matters of national concern, must have the identical privilege.

THE COURT: I am not sure that that, though, is directly on point with what we are considering in this motion. Would you think that a grand jury could not have inquired into the activities of the Employees of the executive who

made these critical statements? In other words, we are going beyond that. We are not concerned here with whether there was a privilege that could be invoked in a civil action or in defense of a criminal case, but whether persons can prevent a grand jury from inquiring about it. What would you say if there had been a grand jury convened and it sought to learn the circumstances of the statements that were made by those two employees of the Executive? Do you think a grand jury could properly look into the matter?

MR. REINSTEIN: Well, your Honor, it probably could, but not in a way that is relevant to this.

THE COURT: Well, in other words—

MR. REINSTEIN: Executive privilege itself is not in the [19] constitution. It has been judicially created to apply to civil tort actions.

THE COURT: So really those cases aren't too helpful one way or the other.

MR. REINSTEIN: They are, your Honor, because we think they limit the scope of the privilege. It is true that in the context of certain deterring acts by individuals, that is, private torts, the executive privilege applies to, for example, press releases. The congressional privilege itself was peculiarly directed, as your Honor is aware from the United States versus Johnson, to criminal proceedings. The difference is, the Executive has no privilege to be free from criminal prosecutions. Indeed, the president himself can be impeached by the House of Representatives and tried by the Senate, and Congress at its will can eradicate either executive privilege or judicial privilege. For that reason, the Executive can be held to answer in the grand jury, but these cases nevertheless do delimit the scope of the privilege.

The only question then is in what cases is it applicable. We submit that if it applies to the Executive Branch, it applies to Congress.

Perhaps a closer analogy to your Honor's question would be the consistent position that has been taken by the Executive that it can disobey a request by Congress to appear and testify before Congress. This was first set out by Presi-

dent Jefferson in the early 1800's and has been followed since.

Furthermore, in the present day, for at least the last two and one half years, President Nixon has invoked this privilege on behalf of staff assistants and said they do not have to accede to the wishes of Congress and appear to testify. Indeed, staff assistants have refused to appear.

I think that is possibly the analogy we are drawing now, because the distinction is whether a coordinate branch of government can forcibly abridge a privilege when the Executive prosecutes itself. We have no such problem of separation of powers. The congressional privilege was peculiarly aimed at curbing the power of the Executive to institute grand jury proceedings.

THE COURT: I think we have agreed that there are some matters about which a grand jury could inquire of a member of the Senator's personal staff, such as things that happened before he became a member.

MR. REINSTEIN: Or bank robberies.

THE COURT: Or bank robberies. There is another example. So doesn't the privilege as asserted by Dr. Rodberg and by you on behalf of his employer, the senator, hinge on the subject matter of the questioning? And what we are dealing with here obviously is the mere appearance of Dr. Rodberg, and we would agree, as I understand it, that were questions to be confined to matters that happened previous to the 28th of June, then [21] there would be no objection, at least on behalf of the senator, if I understand your point correctly.

MR. REINSTEIN: That is right. Dr. Rodberg, of course, would have his own objections on the free speech ground and so forth.

THE COURT: Well, that is true, but I am talking now about this very special privilege which attaches to the senator's activities.

MR. REINSTEIN: That is right, your Honor.

THE COURT: So if that is the case, why don't you have to wait until you see what the questions put are?

MR. REINSTEIN: I think, Your Honor is suggesting that our motion to quash the subpoena is premature.

THE COURT: Well, that is no more than what the government suggested.

MR. REINSTEIN: I think our answer is, Senator Gravel has no right to be present in the grand jury room. Senator Gravel, in order to protect his privilege, must find out in advance what questions are to asked. The decision of whether or not to ask the questions and whether or not to object has to come from Senator Gravel and not from Dr. Rodberg.

Indeed, your Honor, we think it would be clearly unconstitutional for the grand jury to inquire into the action of a United States Senator by breaching a constitutional privilege even if the staff assistant were willing to go along with it, [22] just as it breaches the attorney-client relationship for the grand jury to ask questions of the attorney regardless of whether or not he wishes to co-operate. Therefore, it is essential, for Senator Gravel to protect his own interests, that we know precisely what the scope of the inquiry is to be.

The problem on this record is there appears to be no dispute, and the government's entire legal argument is addressed to the proposition that the grand jury intends to investigate into the official conduct of a United States Senator, and we claim that is barred by the speech and debate clause.

Another factor which your Honor might consider is that the Executive Branch is coming to this Court and asking this Court to use its judicial powers to compel the appearances of Dr. Rodberg. Under the state of this record, we think that for this Court to do it may work unconstitutional ends and may put this Court in the position of being a party to the violation of the speech and debate clause. It seems to me that when a prima facie case of this sort has been made that a senator's aide is being interrogated, and the government not only refuses to deny that the questioning will relate to the legitimacy of the official actions of the senator but goes farther and argues the legal position that

it may do so, that this Court must first assure itself that no such questions will be asked, or else this Court may become a party to the violation of the Constitution.

[23] We think, your Honor, that this perhaps is clear by United States versus Johnson. Johnson did not just deal with the testimony of Congressman Johnson on the stand. Also called were his administrative assistant and his assistant, and they were interrogated as to how the congressman performed his official acts, initially, how a certain speech was prepared which the government claimed was the result of bribery.

The Supreme Court held that no testimony could be taken of not only Congressman Johnson in this respect but of his administrative assistant as well. Furthermore, the Supreme Court went further and said that the official acts of a member of Congress did not form the basis of even a charge of criminal liability.

A member of Congress does not have to be exposed to possible intimidation by a grand jury and possible violation of privilege communications between him and a staff member. If he were, he could not function adequately as a senator and fulfill his constitutional responsibilities. Every senator has to rely on his staff.

THE COURT: I am getting back to something I asked you about before, and that was the analogy that you drew to a congressman's sending newsletters back to his state, or congressional district, as the case may be, and you suggested that publication of the Pentagon papers would be analogous to that. Do you consider that, for example, every speech a [24] congressman may make, wherever it is made, is part also of his official responsibility? Is there any conduct on his part, that is, any speech on behalf of the congressman, which you consider to be outside the privilege?

MR. REINSTEIN: Well, if the congressman were speaking as purely a private citizen.

THE COURT: No. Let's suppose that he attends a fundraising dinner for a fellow congressman, which is a very frequent and customary practice, and he makes a

speech on a matter of public interest to the gathering. Do you think that that would be embraced by the privilege?

MR. REINSTEIN: Yes, your Honor. Yes, I do. The question is whether it is part of the ordinary duties and functions of a member of Congress. The reason we think Darby and Matteo case is so important is that the same question arose there, whether press releases communicating with the public were part of the official duties of a member of the Executive Department—a subordinate official, by the way. We think, your Honor, yes, the answer is a congressman has a high obligation to speak on matters of public concern to his constituents, and he cannot rely simply on the assumption that his constituents will perhaps find out about what he says on the floor of the Senate itself.

Since the beginning of this country, we have seen congressmen campaigning in their own districts. It is always [25] thought of as a virtue for a congressman to go back to his district and find out what his constituents think about important issues. There is a necessary colloquy between a congressman and his constituents. We think he would be violating his constitutional duty to his constituents if he did not inform his constituents of the workings of government and considerations of important policy. Otherwise they will be left in the dark as to how to exercise their franchise.

We think, your Honor, also that under the undisputed facts of this case, another reason why the subpoena should be quashed is the historical context in which it appears. The Supreme Court has emphasized in many cases that the prosecutions, the institutions of criminal proceedings, that is, by the Crown against members of Parliament who are critical of executive behavior, is the taproot of the speech and debate clause, and that this clause must be construed in any given case with this history in mind. Under the undisputed facts of this case, what we seem to have is the institution—or what we do have is the beginning of the institution of criminal proceedings. And the grand jury, of course, your Honor, I would like to emphasize is an arm

of the Judiciary which begins criminal proceedings. That is its function. Its function is to inquire into the legitimacy of an individual's conduct to decide whether or not an indictment should be issued against him. It differs in no respect, in that context, from testimony taken in court itself.

[26] In any event what we have here is the institution of criminal proceedings as a result of the disclosure by a member of Congress of material highly critical of Executive conduct in the field of foreign relations. I pointed out in my brief that one of the most notorious cases which led to a constitutional crisis in England almost exactly like this was when King Charles prosecuted Sir John Elliot and others who were critical of the War of the Seas. He said it was a violation of law and subversive and he pointed to certain statutes into which there should be inquiry. We think, your Honor, if history condemns those actions by King Charles, which led to the creation of legislative privilege, then it is unquestionable that the government could be permitted to turn its back on our constitutional heritage in this case.

Your Honor, I know I have taken quite a bit of time. If your Honor permits, I would like to comment very briefly on a couple of arguments the government makes, because I think this they have really turned upside down, and they have not addressed themselves to the terms of the speech and debate clause or to its historical origins or to policies underlying it. I say this because the government has cited cases and made the argument that the speech and debate clause was intended only to protect congressmen from civil arrest. It has talked about a completely separate cause, which is the privilege of congressmen to be free from civil arrest while they attend sessions of [27] the House. It is the clause preceding the speech and debate clause.

It has no conceivable relevancy, a congressman saying, "I cannot be prosecuted, because what the government intends to inquire into is the legitimacy of my official conduct." This is revealed by Williamson versus United States,

which the government places strong reliance on. In the first page of the opinion one Williamson was prosecuted for subornation of perjury in court in a large-scale land swindle. When the court was about to pronounce sentence he argued against the court passing sentence upon him, and especially to any sentence of imprisonment, on the grounds that thereby he would be deprived of his constitutional right to attend at and return from an ensuing session of Congress. They did not mention the speech and debate clause. The court said the question presented—this is at page 433—as to the scope and meaning of that article and section of the constitution relating to the privilege of immunity from arrest during their attendance on the session of the respective house, then going to and returning from the same."

With all due respect I think the government's argument would be analogous to arguing the history of the First Amendment by talking about the history of the Fifth Amendment. It just has no relationship.

It is true that that clause of the Constitution was [28] intended to bar private arrests; and it is also clear that the other clause, the speech and debate clause, was intended to bar criminal prosecutions of the official activities of members of Congress.

THE COURT: Let me ask this please: if there is any place in which you draw the line between situations which would be covered by the privilege and those which would not. Take, for example a member of the senator's personal staff who had no discretion in matters but was just doing ministerial types of things, such as perhaps, well, a messenger or a driver perhaps, someone like that. Would you consider that this same privilege would apply to such employees?

MR. REINSTEIN: I think the question would have to be asked whether there is a confidential relationship between them if I may use an analogy.

THE COURT: That is what I am endeavoring to see, whether the Court in this type of matter considers types of

things done by Dr. Rodberg as a member of the senator's staff or if you consider a finding that he is a member of his staff automatically forestalls further inquiry.

MR. REINSTEIN: Your Honor, the question is, a finding, as I understand it, has been made that he is a personal staff assistant of Senator Gravel. The question is whether the grand jury will be inquiring into the official acts of Senator Gravel or of the acts of Dr. Rodberg in assistance to Senator Gravel. [29] In other words, whether the grand jury is attempting to pierce the confidential relationship between the two and, so to speak, go after Senator Gravel in much the same way it would call a wife to testify in an investigation into the legitimacy of her husband's actions, or an attorney to investigate the legitimacy of his client's actions.

The question would have to be asked whether or not the government is seeking to inquire into these official activities through this confidential relationship. It seems to us that Dr. Rodberg's affidavit and Senator Gravel's, in which allegations—in which they speak of Dr. Rodberg as being a personal member of the staff and acting under his direction and control, of necessity leads to the proposition that Dr. Rodberg is in much the same way, if I may suggest, as your Honor's law clerk is to you. Certainly an independent agent of Congress, such as the Sergeant at Arms, who acts like a policeman or a messenger boy who is not employed by the senator at all but is employed for one reason, and that is to deliver things, certainly would be another difference, like United States Marshals in this court.

That is why, your Honor, I think in order to give full protection to the congressional privilege, on the undisputed facts of this case the subpoena must be quashed. If the government intends to retreat from the position it has taken so far, I think, your Honor it must give a specification of the [30] precise questions to be asked of Dr. Rodberg so that Senator Gravel's constitutional rights will be adequately protected, and also so this Court does not give authority to unconstitutional violation. Since the

Executive has come to court for this Court's assistance, it is the obligation of Judiciary, under Marbury versus Madison, to make its own evaluation of the constitutionality.

If there are no further questions—

THE COURT: All right. Thank you. I will hear Mr. Reif.

MR. REIF: May it please the Court. I would like at the outset to define as narrowly as possible what we conceive to be the issue in this rather extraordinary, impressive case.

I would suggest at the outset that it is not, as the government has addressed itself, the question of whether or not Senator Gravel or a personal staff member of Senator Gravel, or anyone else, for that matter, can be prosecuted in connection with any activities conducted by or on behalf of Senator Gravel. The issue is more narrow than that. It is whether in fact a member of the personal staff of a senator of the United States may be compelled to appear in a secret proceeding to be questioned by the Executive Branch as to the conduct of that senator in the performance of his constitutional duties.

Your Honor has raised the question of whether publication of papers by the senator to his constituents can be considered within the scope of the speech and debate clause. I would [31] suggest that it is very much within the scope of the speech and debate clause, and I would refer your Honor's attention to the decision of the District Court of Columbia in Hentoff versus Ichord, which case indeed the government cites.

In that case, Judge Gesell says quite specifically the republication of the committee report is within the scope of legitimate legislative activity and is protected by the speech and debate clause. He rejects the arguments made by the plaintiffs in the case that it is somehow without the scope of the clause.

I would also call your Honor's attention to the fact that in his statement on June 29th, Senator Gravel made quite clear in this statement in the Record that everything he was doing in connection with the Pentagon papers he was

doing as a senator in furtherance of his constitutional responsibilities as a senator.

I tried to define the issue as I have at the outset because I do not believe the Government has addressed itself to that question. Rather, they have addressed themselves to the question of prosecution, and there is considerable discussion about the question of civil arrest, which refers entirely to a separate clause in the Constitution.

As Mr. Reinstein has indicated, it is undisputed that Dr. Rodberg is a member of the personal staff of Senator Gravel, and that the grand jury is inquiring into the activities of Senator [32] Gravel in connection with the Pentagon papers.

The Pentagon papers are not just ordinary documents or run-of-the-mill documents. They are documents which are highly critical of the Executive Branch. As has been discussed in newspapers and other written materials, they disclose a rather large degree of deception by the Executive Branch for several years and its revelations with respect to the war in Vietnam. For Senator Gravel to take the position that it is his constitutional duty to expose deception we submit is fundamentally the purpose of the speech and debate clause. As the Supreme Court made clear in United States versus Johnson, the purpose of the clause is not so much to protect against civil action by an individual, but rather to protect the Congress against hostile and retaliatory conduct on behalf of the Executive, and it is precisely that factual context which is before the Court.

We believe that analysis of two established privileges is helpful in resolving the issue here, and compels quashing of the subpoena. The privileges to which I refer are the attorney-client privilege and the husband-wife privilege, which have been established for many years within the law. These privileges were derived from the importance of maintaining the relationship between the two individuals involved in those cases. If one could be forced to testify against the other, it would result in destruction of the relationship, a relationship which is deemed by society to

be desirable, and consequently a common [33] law privilege arose which provides immunity from testifying, as by wife against husband and, conversely, in the same situation as attorney-client.

THE COURT: Well, excuse me, but I would rather talk about this particular case, because I don't think we have to go into the attorney-client and husband-wife privileges and so forth, although those are helpful analogies that have been mentioned. I would rather like to tell you something that bothers me a little bit about the situation, something I might well have asked before and didn't think to, but in rebuttal, counsel for the senator could speak about this if they wish.

Here is the New York Times case, and the New York Times case I think makes quite clear that there can be criminal prosecutions for the unauthorized possession of secret documents. There is surely nothing in the New York Times opinion that would make it seem legal to have done whatever was done by whoever possessed the Pentagon papers without authority. That is my starting point.

Now, here we have a situation where the Pentagon papers, comprising forty-six or forty-seven volumes, or however many they comprise, were not offered by the senator. He had nothing to do with their preparation originally, but only with their disclosure or only with their publication. I don't mean by the word publication just the printing, but I mean the quoting from them, publication in the broadest sense of the word.

[34] So assume, just for the sake of the point—because this is going to be litigated out in California—assume that there is a valid crime that can be committed with respect to publication of the Pentagon papers. I don't suppose that publications through a congressman, let's say, as a conduit would serve as a defense automatically. I don't say that is what was done in this case. I am speaking hypothetically.

Let's assume hypothetically that Prof. or Dr. Ellsberg obtained the Pentagon papers through the office of a congressman, though that is not what happened here. I don't

suppose that obtaining secret papers through a congressman's office would confer immunity on the person who obtained them thereby, and I don't expect you would disagree with the proposition. I am wondering where the distinctions are here. I am trying to see what was done here.

Go back to my hypothetical. Suppose Dr. Ellsberg, rather than a publishing house, had, in the first instance obtained the Pentagon papers through the office of any congressman. What would your view in that hypothetical situation be? Would you consider that this passing on would be a protected publication?

MR. REIF: I think it would very much depend upon circumstances surrounding how in fact the documents were transferred. If they were taken without the senator's or congressman's authorization, then I would take it there is no protection.

THE COURT: Well, I would assume that this was a congressman [35] who felt it was in the national interest to have the Pentagon papers widely read and studied, and who, out of a sense of duty and public interest, was the conduit for the distribution of the papers to a scholar such as Dr. Ellsberg what would your—

In other words, what I am trying to get at is whether transmission of previously created material, that is, the papers created by the authors thereof, is to be distinguished for some purpose from what a senator might himself create and author personally.

MR. REIF: I don't think there is any distinction there. I think the distinction between the hypothetical situation and the present case is that in that case, the transfer to a third or fourth person, however, is not a person who is in any way an aide of the senator nor acting in furtherance of the senator's express wishes.

I take it, for example, that at least in theory, anyone who now comes into possession of the Pentagon papers through its distribution by whoever could conceivably be subject to prosecution under 793(e), I assume that to be the case, but these people and the person in the hypotheti-

cal are not personal staff aides of the senator, and I do not think really that we even have to get to the question of whether or not anyone can be prosecuted. The question is, How does the government go about getting the information for the prosecution? That is why I was interested before in the husband-wife privilege, because [36] I thought it was a direct analogy there.

If, for example, a husband commits a crime, he can be prosecuted for that crime but it does not follow that his wife can be compelled to testify about that in the grand jury. That is the point I am trying to make here.

We think that Senator Gravel and Dr. Rodberg and any other legislative aides are immune from prosecution, but we don't feel it is necessary to reach that question. All we are concerned about here is whether or not Dr. Rodberg, a personal staff member of Senator Gravel, can be forced to testify about that relationship. That is the only point that we have here.

The reason we feel that the relationship is so important between Senator Gravel and Dr. Rodberg—and, for that matter, between any senator and any personal staff member—is because—the Court will take judicial notice of the fact that senators and congressmen, and indeed any government official in high position relies heavily on the work of his personal staff to fulfill his own constitutional duties and obligations. Indeed, in the Barr versus Matteo case, the Supreme Court said specifically the magnitude of government activity has become so great that there must of necessity be delegation and redelegation of authority as to main functions. We think that is true as to obviously any government official particularily a United States Senator.

We feel, in light of the importance of maintaining that [37] working relationship between a senator and a close personal staff aide, the aide cannot be compelled to testify about the nature of that relationship. It is for that reason we believe Dr. Rodberg is privileged not to appear and testify to that.

Finally, on this particular point, I am somewhat surprised at the position the government has taken in their brief. The brief on behalf of the senator has mentioned there are several instances where the Executive has expressly refused to permit questioning by the Legislative Branch of an Executive official on the ground that it is somehow privileged, and in the illustration Dr. Kissinger was referred to. Furthermore, last week there was the question of the working report with respect to nuclear testing in Senator Gravel's own home state, which the Executive refused to turn over to the Legislature.

I also direct your Honor's attention to the case of United States Servicemen's fund versus Eastland, which is a case presently pending in the District Court for the District of Columbia, Civil Action 1474-70. That is a civil action brought by a private individual for the sole purpose of enjoining a subpoena issued by a legislative committee, and the defendants are Senator Eastland and Mr. Sourwine, who is the counsel to the subcommittee involved. It is not a suit for damages; it is simply a suit for injunctive relief against compliance with a subpoena and the government has opposed the taking of Mr. Sourwine's deposition.

[38] I have a brief signed by the Justice Department, in fact, by Mr. Monahan, who is head of the Internal Security Division, who takes the position in their own brief that without consent of the appropriate authorities in the Senate, Mr. Sourwine does not have to answer by means of deposition questions put to him in that lawsuit.

In this case not only has there been no authorization by Senator Gravel as to permitting Dr. Rodberg to testify; it has been quite the contrary, Senator Gravel has intervened and made quite clear his feeling that Dr. Rodberg should not be compelled to appear and testify as to the subject matter in question.

I believe in light of all we have said, in light of what Mr. Reinstein has said on the present state of the record, the subpoena must be quashed.

If your Honor has no further questions on the speech and debate clause issue I would like to proceed to the First Amendment issue.

THE COURT: Well please don't say everything that Mr. Levine said before. In other words, you have been here and heard the Court's colloquy with Mr. Levine on behalf of Dr. Falk. But hit the highlights, please, rather than repeat what he said to the extent that the arguments are the same. To the extent that they are different of course, you will have to speak separately to them.

[39] MR. REIF: At the outset, I would like to refer to two cases which were relied upon so heavily by the government because I think they have no bearing upon the present case. They referred to the Blair case for the proposition that the grand jury can compel all sorts of testimony from all sorts of people who have no right to decline on any grounds to furnish that evidence or those answers.

I think the Blair case does not at all stand for that proposition. It stands precisely for the proposition that a witness has no standing to question the constitutionality of a statute that is being investigated. That is the sole holding of the Blair case. Furthermore, I would like to point out that subsequent to Blair there have been numerous cases in the Supreme Court and many lower Federal Courts which have recognized numerous exceptions to that general rule about compelling a witness to testify.

It is well established, for example, that the Fifth Amendment privilege against self-incrimination is protected, protection is afforded before the grand jury. There are numerous cases to that effect. I take it it is beyond question.

Furthermore, there is the Fourth Amendment, the Silverthorne case, decided one year after the Blair case, various statutory privileges with respect to electronic surveillance and with respect to Egan and Evans. Furthermore, there are privileges as to husband and wife and attorney-client, which is a common [40] law privilege. So it is not at all undisputed that a witness may not be compelled to answer

questions before a grand jury. That has been well established in a variety of circumstances.

I take it on the basis of numerous cases involving legislative investigations which are cited in our brief, there is also a defense that the appearance and the questioning would violate the First Amendment. With respect to the Kinoy case, I am kind of at a loss to explain this, but Miss Peterson, Mr. Stavis, and I were counsel in that case, and the sole question before the court was the admission by The U.S. Attorney in that case that the only question they wanted to put to Mr. Kinoy was as to the whereabouts of his daughter. That was the sole, immediate question they wanted to ask Mr. Canoy before the grand jury, and it was on that basis that the First Amendment claim with respect to a lawyer's First Amendment activities as a lawyer was denied, and instead, when Miss Canoy subsequently came forward, Mr. Kinoy never went before the grand jury in that case.

I think the importance of the factual situation in this case is the understanding of what a man like Dr. Rodberg does in his work as a scholar and as a consultant to various congressmen, not only as a personal staff assistant to Senator Gravel but to other congressmen, as we have set forth in the affidavit.

THE COURT: Let me say, he is further away from being a newsman, is he not, than was Prof. Falk. Prof. Falk has been [41] published very, very widely in magazines, books, et cetera. I gathered from the affidavits that Dr. Rodberg is not as much of a journalist as Prof. Falk. Is that a fair reading?

MR. REIF: It is true that Dr. Rodberg has not published as many books or articles as has Prof. Falk. However, Dr. Rodberg has in fact published numerous articles and given numerous speeches and lectures on his own, as was cited in the affidavit, by way of example, the chapter which he wrote in a book commissioned by Senator Kennedy on the

ABM. Dr. Rodberg is continuing work on various publications and has written numerous publications, although not as many as Dr. Falk.

THE COURT: Do you think of him as a journalist?

MR. REIF: I think he performs multiple roles. The lines between the roles are not always clearly drawn. He obtains information which he uses, then supplies expert advise, expert testimony, expert public writings on the subject, particularly the decision-making process with respect to the war in Vietnam.

THE COURT: Here is an obvious consideration here: We have all of us to be alert to the possibility of expanding this newsman's privilege to a point where it is unrecognizable and undefinable. I suggested before the writer for a weekly newspaper. Then you can go to a weekly magazine, a monthly magazine, and a quarterly magazine. Then you can go to a lecturer, a man who is on the lecture circuit and then you can expand it to a point where you cannot define it or apply it, [42] and query, whether Dr. Rodberg's activities are sufficiently close to those of a newsman to even fit under the general, broadest interpretation of a newsman's privilege to the extent that it exists.

MR. REIF: I agree with your Honor that there ought to be a standard clearly established as to the scope of First Amendment rights with respect to a grand jury. I do feel there is a need for that. I believe Dr. Rodberg falls within the proper standard. Dr. Rodberg, it is true, does not publish as much as Dr. Falk. He does, however, continually and has for several years published and written for public dissemination much on the war in Vietnam, and I would point out specifically the type of article Dr. Rodberg is involved in writing is not a general discussion of the war in Vietnam, not general material on that subject, but for the specific purpose of converting public opinion to a particular point of view with respect to the war.

The materials Dr. Rodberg has written and continues to write are for the purpose of slanting public opinion to oppose the present policies in Vietnam, and I think Dr. Rodberg and Prof. Falk in that regard have occupied a unique role in America in the last five or six years, because, as your Honor well knows, at the outset of the war, it was universally accepted in the country that the war was acceptable. Now there is opposition to the war, and one of the major reasons for that [43] is that scholars like Dr. Rodberg have contributed much to public information with respect to what is going on in the war, information which has been otherwise kept from the public by the Executive Branch. It is for that reason we do feel that Dr. Rodberg does fall within the permissible scope and proper scope of the First Amendment privilege.

We feel that there are two relationships which are threatened here by the proposed appearance of Dr. Rodberg. There is the relationship of Dr. Rodberg and people from whom he gets confidential information which it is not illegal necessarily to obtain, and there is the relationship between Dr. Rodberg and the people to whom he disseminates that information. He disseminates it directly to the public and he disseminates it directly on occasion on a consulting basis to numerous senators and congressmen, and we feel that both those relationships are threatened if Dr. Rodberg has to testify as to his area of expertise, how he got it, and what he did with respect to his work with respect to Senator Gravel and other senators.

We feel the public's interest and right to know is an interest not only in Dr. Rodberg. His continued ability to provide expertise and advice and information to the public is seriously threatened if he has to appear in the present context of this case. We feel on that basis the government has to take the burden. We don't feel it is an absolute position.

We recognize that there are numerous exceptions to testifying [44] before a grand jury, as for example, the

Fifth Amendment privilege. We are asking the government to come forward with some showing of why Dr. Rodberg should be forced to testify in the circumstances of this case. Before they do, we believe he does not have to appear.

Addressing myself to one final point on the question of appearance versus refusal to answer specific questions, I think the immunity from appearance in this case flows, one, from the existence of the privilege to decline to answer questions which would abridge First Amendment rights, and the government's failure to come forward and show whether Dr. Rodberg would be questioned as to anything else.

That was precisely the situation in Caldwell. The court first established the privilege and then said since the government has failed to come forward saying he will be questioned as to anything, there is no reason why he has to appear at all. We feel that failure of the government is apparent in this case as well, failing to have satisfied that condition.

THE COURT: I think we should take a forty-five minute recess. I don't want to put counsel under such pressure as to feel they have to argue without letting them have some lunch and speed it up for that reason, so we will recess until quarter before two.

[The luncheon recess was taken.]

[45] AFTERNOON SESSION

(The hearing was resumed at 1:45 o'clock p.m.)

THE COURT: All right.

MR. VINCENT: May it please the Court. The movant in this instance, your Honor, has raised two basic points. The first is that he is immune from the service of a subpoena because of his legislative privilege. The second point is under the First Amentment.

In regard to the legislative privilege, I would like to say, your Honor, that Dr. Rodberg is either immune from service, either from his own position or derivatively from the position of Senator Gravel. The main authority relied on is the speech and debate clause of Article I, Section 6 of

the Constitution. That your Honor will find at Page 2 of the government's brief. I would like to point out, your Honor, that that clause in the Constitution states: "The senators and representatives shall in all cases, except treason, felony and breach of the peace, be privileged from arrest during their attendance at the session of their respective houses, and in going to and returning from the same; and for any speech or debate in either house, they shall not be questioned in any other place."

Special note I think should be made, your Honor, that that clause is limited to senators and representatives. No reference of any sort is made to either servants or employees. The authority cited by Dr. Rodberg is contained in his brief in in [46] support of his motion to intervene – I'm sorry, the brief of Senator Gravel to intervene, and at Page 6 of that brief he cites from Jefferson's Manual, which is the unquestionable authority on legislative procedures, from Section 3 dealing with privilege.

Senator Gravel in his memo states that "Members of the legislature are at all times exempted from question elsewhere, for anything said in their own house; that during the time of privilege, neither a member himself, his wife, nor his servants may be arrested on mesne process, in any civil suit, nor impleaded, cited, or subpoenaed in any court." The citation is to Jefferson's Manual and Rules of the House of Representatives, and the senator's moving papers.

I have with me, your Honor, a copy of the Rules and Manual of the United States Senate, made in 1967, which also contains Jefferson's Manual in toto. In this Manual, the Section 3 on privileges appears at Page 382 and Page 383, and I have taken the liberty, your Honor, of reproducing copies of those two pages.

THE COURT: All right.

[Document tendered to the Court.]

MR. VINCENT: And I direct your Honor's attention to the second full paragraph on page 383, but before I read that, your Honor, I go back to the first sentence of Section 3 immediately preceding the portion quoted by

Senator Gravel. That first [47] sentence reads: "The privileges of members of Parliament" – you will note, your Honor, in his papers Senator Gravel said members of the legislature; Thomas Jefferson is speaking of Parliament at this point – "from small and obscure beginnings have been advancing for centuries with a firm, never-yielding pace."

Now we go to the paragraph I pointed out on page 383:

"It was probably from this view of the encroaching character of privilege that the framers of our Constitution, in their care to provide that the laws shall bind equally on all, and especially those who make them shall not exempt themselves from their operation, have only privileged Senators and Representatives themselves from the single act of arrest in all cases except treason, felony, and breach of the peace, during their attendance at the session of their respective houses, and in going to and returning from the same, and from being questioned in any other place for any speech or debate in either house." Citing the Constitution, Article 1, Section 6.

In light of the complete statement of Thomas Jefferson in his Manual, the government submits, your Honor, that the reliance of Senator Gravel and Dr. Rodberg is misplaced, in relying on that as authority for including servants and employees of members of Congress.

I would like now to look at the claim of Dr. Rodberg that his immunity is that of derivation from the immunity held by the [48] Senator. I believe, your Honor, that the law is very clear that senators are not immune from criminal process. We recall from the Constitution that immunity does not apply in cases of treason, felony, and breach of the peace. However, rather than being limited to only these two categories, the Supreme Court has held that these words refer to all criminal proceedings whatsoever.

This appears in Williamson versus United States, at 207 U.S. 425, at pages 445 and 446. In that case the defendant, who was a member of the House of Representatives, had been indicted, tried, and convicted for subornation of perjury. He claimed immunity under the speech and debate clause, the same as Senator Gravel and Dr. Rodberg.

The Supreme Court in rejecting this claim cited with approval Cushing's Treatise on the Elements of Law and Practice of Legislative Assemblies in the United States, which said, and I quote from the case, at page 445-46, "The terms treason, felony, and breach of the peace as used in our Constitution embrace all criminal cases and proceedings whatsoever."

I think that even the movants here will agree that a grand jury subpoena is in a criminal proceeding. The courts have consistently held that congressmen are subject to subpoenas issued to obtain their testimony in court proceedings. By those proceedings, I am referring to criminal proceedings. Mr. Justice Chase, as early as 1800, in the case of United States versus [49] Cooper, at 4 Dallas, held that a congressman was subject to a subpoena even if Congress was in session. This rule has been applied as recently as 1960 by Judge Weinfeld sitting in the Southern District of New York in the case of United States versus Seeger, and that is found at 180 Fed. Supp. 467. Both the Seeger case and the Cooper case are cited in the government's memorandum.

Now even assuming that immunity attaches to a senator, and I am only assuming it, it is only when he is engaged in the lawful pursuit of the duties within the scope of his legislative functions.

Now what are our facts in the instant case? A subcommittee meeting was called at midnight and certain documents, which Senator Gravel and Dr. Rodberg assume are the basis for this opinion, were read to members of the press and members of the subcommittee. I direct your Honor's attention to the extract from Public Law 601, which I have handed to the Court, which sets forth the composition of the Committee on Public Works. I have here, your Honor, a copy – I regret that I only have one; I will make it available to your Honor – a copy of the legislative calendar of the 92nd Congress dated as recently as August 16th this year. You will note that in this document, on page 3, in Subcommittee of Public Buildings and Grounds is a third,

a Subcommittee of the Committee on Public Works, with Senator Mike Gravel as Chairman.

[50] I also would point out to your Honor that on page 2 of this document there is reproduced the names and the roster of the professional staff, the senior professional staff, and the clerical staff. Dr. Rodberg's name does not appear in any of the staffs of the Senate.

THE COURT: Well, that is not what they say he was. They say he was a member of the Senator's personal staff, so there is no claim that he was a member of the committee staff.

MR. VINCENT: I only point that out, your Honor, because I think I have already shown that no employee of the Senate, whether it be of an individual senator, much less an individual senator, if he is a member of the Senate staff, has no privilege; a fortiori, a member of a personal staff of a senator certainly cannot have the privilege.

THE COURT: What do you make of the Johnson case?

MR. VINCENT: Which one, sir?

THE COURT: The Johnson case, involving the prosecution for the preparation of a speech that was said to be contrary to the speech and debate clause.

MR. VINCENT: Yes, your Honor. That is the case where a member of the House was indicted on seven counts of perjury and one of conspiracy, as I recall. The House member was convicted on all eight counts. When it got to the Circuit Court of Appeals, the Court of Appeals reversed the conspiracy count, upholding the – I am sorry, they sent the perjury counts back for a new trial, [51] and they dismissed the conspiracy count because evidence had been used from a speech made on the floor of the House by the defendant, Representative Johnson.

When it got to the Supreme Court, the Supreme Court reversed the Circuit Court on the conspiracy count, reinstating the count, and sent all eight counts back for a new trial, holding that the government could not use any evidence of the speech made on the floor of the House.

Now, your Honor, that certainly comes within the protection of the speech and debate clause.

THE COURT: But didn't it go beyond that and say that it couldn't use, for example, evidence of agents' activities or assistants' activities in connection with preparation of a speech? even if it were not the activity of Representative Johnson himself.

MR. VINCENT: That is correct, your Honor, in connection with a speech made on the floor of the House, which is specifically excepted from Article I, Section 6 of of the Constitution.

THE COURT: I do, of course, recognize the distinction, but I was wondering what you thought of that case on the proposition that the senatorial or congressional privilege is not restricted to the congressman himself but extends also, under some circumstances, to aides of the congressman.

MR. VINCENT: I don't think the case does hold, your Honor, or stand for that principal. I don't think the issue was in [52] that case. It had to do with evidence used against the congressman himself, and I do not recall that the Supreme Court as part of its holdings and decision said that an employee of the House is immune and has the same immunity and privileges as the Representative or the Senator.

I think the case does highlight very, very clearly, your Honor, that congressmen are not immune from criminal process. This man was convicted of a criminal offense, so the immunity extended by that speech and debate clause is highly respected. It does not apply to criminal proceedings of any type.

Now if it cannot apply to criminal proceedings of a congressman, as I say, a fortiori, it cannot apply to criminal proceedings involving members of the staff.

Referring back again, your Honor, to the meeting of the subcommittee called by Senator Gravel, I notice that attached to the moving papers of Dr. Rodberg they very kindly attached a copy of an article from the Washington Post dated August 8, 1971, apparently in support of their motion,

and I call your Honor's attention to the paragraph at the bottom of column two of that article, which reads, the report made by Senator Gravel at that midnight subcommittee meeting on June 29th "has not been published because Chairman Jennings Randolph reportedly was so furious with Gravel for calling the unauthorized, nongermane subcommittee meeting that he refused to authorize payment of a stenographer or a public record."

[53] In regard to the nongermaneness of the subject matter, I direct your Honor's attention to the extract from Public Law 601, which sets forth in nine categories the subject matters covered by the Public Works Committee. I won't read all of them, since your Honor has a copy, but I notice that they are all restricted to either the improvement of rivers and harbors, navigation, bridges, Customs Houses, Federal Court Houses, government buildings within the District of Columbia, Rock Creek Park, the zoo, and the construction and maintenance of roads and post roads.

THE COURT: Let me just interject, please, that I am concerned here with the power and propriety of the executive and judicial branches of government in passing upon what is the proper or improper business of a particular subcommittee or committee or activity of a member of the Congress. You did cite in your brief somewhere a case, I think, to the effect that the courts may look into this matter, look into such matters, such as the authority of a congressional committee to take certain action or the authority of a member of Congress to do certain things. I haven't read the case, and I would appreciate it if you would tell me which one it is.

MR. VINCENT: It is on page 10 of our memorandum, your Honor, and the landmark case is Marbury versus Madison. The cases have been consistent from that time on that the courts do have the right to inquire into and reject unauthorized [54] legislative activity. As I say, I don't recall those cases myself, but they are in our memorandum.

THE COURT: Well, that isn't the issue here, really. The question isn't whether the meeting of the subcommittee, let's say, was authorized or the subject matter of its meeting was in line with its authority from the parent committee; it is, I expect, whether the Court can inquire into that in this proceeding and whether any order of the Court could be based on any such inquiry. I have genuine doubts as to the power of the Court to rule upon the legality or authenticity or validity of this subcommittee meeting. That, it would seem, would be the power of Congress, I should think, and the power of the parent committee.

All I am really asking is that you elaborate on what you said already. You cited Marbury versus Madison. That I have read, of course, I read that sometime ago, but what about some of these other cases? Are they anything like this? Are there cases involving grand jury investigations or anything of similar nature?

MR. VINCENT: These are not grand jury investigation cases, as I recall, your Honor. The Watkins case, of course, is a contempt of Congress case. No, none of these, your Honor, deal with grand juries, but I have cited them for the principle that the courts have ruled under certain circumstances that congressmen have acted outside the legislative scope, and I cited it for two [55] reasons.

First let me answer your question as to the legislative purpose of the subcommittee meeting. I agree at least in part, your Honor, that the parent committee and the Senate itself, the parent body, certainly has the right and the authority to rule on whether or not a matter handled in a subcommittee is within a legislative purpose.

Now the contempt of Congress cases I think are an excellent anomaly, that you cannot sustain a prosecution for contempt of congress unless the courts find that the committee had a legislative purpose and was acting within its scope. That is one of the basic accompaniments, contempt of Congress, under Section 192 of the United States Code. As I say, your Honor, I cannot cite you chapter and verse in these cases, but I do know the rule is that the courts, the

judiciary, can rule on whether or not an act of a congressman is outside of the legislative function.

This point is more or less of an aside for these reasons: that the defense here is based on immunity, and I think we have shown your Honor that there is no immunity (a) to a congressman in a criminal proceeding, that is, to resisting a subpoena issued in a criminal proceeding, and (b) certainly not on a member of his staff or a member of his personal staff. There is absolutely no protection in the speech and debate clause under the decided cases and tradition in history, as Thomas Jefferson pointed out. The Constitution and the founders of [56] this country drafting the Constitution left it out, the portion about his family and his servants, because Parliament had been increasingly encroaching on its own power and bootstrapping itself or trying to bootstrap itself, and I think it is very important that we don't have immunity, and that is the defense of this case.

The second reason for citing the power of the judiciary to inquire into and rule is the fact that on the facts in this case, even assuming again arguendo that Senator Gravel and through him derivatively Dr. Rodberg had any immunity, the government's position is that they divested themselves of that immunity by taking the documents they refer to and which they believe and think and assume are involved in this proceeding, and had contracted for and negotiated for to be published by a private publisher, and I certainly, your Honor, think and urge that that is ultra vires, and even if they had privilege, which I certainly do not think they have under the law, that this takes them outside of even that privilege, and the Court certainly is entitled and capable of ruling on that.

THE COURT: What about the analogy that counsel made to sending newsletters to constituents and making speeches at public forums on issues of national concern?

MR. VINCENT: Well, I don't agree, your Honor, that a speech in a public forum grants immunity to a congressman. The Constitution certainly doesn't encompass that, and I don't know of any [57] immunity for a newsletter if it is

privately done. If it is authorized by the parent committee and/or by the Senate and it is printed by the Government Printing Office or government funds are used, then you might have a question, provided the newsletter, as I say, has been authorized by Congress, but there again I would have to know the particular facts.

I don't think that generically anyone can claim a privilege ipso facto of sending a newsletter out. It might have absolutely nothing to do with congressional purposes whatsoever. If there is any libel matter or slander, I am not too sure but what the author could not be sued.

THE COURT: With respect to the Senator's quoting from these papers at the subcommittee meeting, would you take the same position were this quoting done on the floor of the Senate itself?

MR. VINCENT: If the Senator had quoted anything on the floor of the Senate, I would say he has immunity.

THE COURT: Now suppose the reading were done at a committee meeting of the Senate, let's just say the Committee on Foreign Affairs. What would your position be in such a situation?

MR. VINCENT: I believe there he would have immunity, your Honor.

THE COURT: So that here it is critical, in your view, that this was done at a meeting of a subcommittee of the Committee on Public Works.

[58] MR. VINCENT: That is right, your Honor. As one of the facets –

THE COURT: Well, I understand that you have other ficant, with respect to –

MR. VINCENT: Yes. Right.

THE COURT: And it is your view that the time and place and room in the Capitol where this was done is significant, with respect to--

MR. VINCENT: I think it is highly significant, your Honor, yes, I do, just as I do the fact that the chairman of the full committee would not authorize payment of either a stenographer or the printing in the public record. In

other words, as I read this, your Honor, the act of Senator Gravel has been eschewed and disclaimed by the chairman of the full committee.

THE COURT: I never interpreted this copy of the newspaper article as being an adoption of everything that was said in it. I thought it was filed for a more limited purpose, but the Senator's counsel would doubtless comment on that aspect of it. I never understood that everything stated in these exhibits attached to the motion was submitted as proof of facts, of all of the facts therein stated.

MR. VINCENT: As I say, your Honor, ordinarily I realize that a newspaper article is hearsay, but since it has been attached as an exhibit by Dr. Rodberg, I certainly think that it is only fair that I should be able to refer to the contents [59] of the article.

THE COURT: Well, you certainly may.

MR. VINCENT: I am not saying, your Honor, that I know this to be a fact, I am not saying that the newspaper article--vouching it to be the complete truth of the facts stated, but I find it highly interesting that there was no refutation in the moving papers, there was no restriction, as I recall, on the use of the article.

Of course, if this were a trial and we were entitled to have live witnesses, it would be a simple matter to request or – I am afraid to use the word – subpoena the chairman of the full committee.

THE COURT: The articles were attached as exhibits to Paragraph 8 of the motion, which simply says that it is believed that the questions to be asked "will concern the allegation made in the newspaper articles attached hereto," so that – Well, that is a minor point, but I do think I should note in passing that I don't necessarily consider everything that is stated in these articles as having been factual. That isn't the purpose for which they were offered.

MR. VINCENT: Even there, your Honor, the newspaper article is submitted specifically for the point to show that the Senator, through Dr. Rodberg, has negotiated a contract for outside publication of a document which certainly is

not within the purview of the Subcommittee on buildings and grounds. The case of Long v. [60] Ansel, which is also cited in our memorandum, in 69 Fed.2d, stands for that principle, that a congressman can divest himself of any privileges he holds by acting on the outside and going outside the legislature. As I interpret it from the cases, your Honor, the speech and debate clause is restricted to congressmen and senators themselves, not their employees, not their servants, and at most, to fall within its ambit, the congressman must be acting for a legislative purpose. I think all of the cases, your Honor, only some of which are cited in our brief, which hold that congressmen are not immune from criminal prosecution, certainly uphold that principle.

Unless your Honor has anything further, that is all I have on the legislative point, your Honor, because I think we have demonstrated that there is absolutely no immunity in Dr. Rodberg.

THE COURT: Well, I haven't read a number of the cases that have been mentioned. I am not going to rule on this matter this afternoon. I will be taking this under advisement. I do have a question on another aspect of this case, although I have forgotten whether Dr. Rodberg raised the electronic surveillance point.

MR. VINCENT: You have already ruled on that, your Honor.

THE COURT: I know that, but he did raise it, and what I have in mind is my having quoted or adopted Mr. Justice Douglas's language in the early cases. This is when we had the Popkin case, the MIT professor. There I am sure I was unaware that in [61] that case, there had been, at least according to Mr. Justice Douglas and the copy that I now have, a representation to the District Court that no wire taps of any kind had been used in the Russo case. Do you think that that representation was critical to Mr. Justice Douglas's decision?

MR. VINCENT: Not as I read that, your Honor, and bearing in mind, of course, that this is purely a denial of a

bail application, a denial of a stay pending appeal. There is nothing to do with the merits of the case whatsoever, and Justice Douglas, as I read the opinion, your Honor, was aware of this fact, and he then went on to say – the language I quoted previqusly and which I don't have in front of me, but there must be more than a mere suspicion, and I think he was giving, in my private opinion, a preview of what the law might be.

THE COURT: But when you cited that case to me last month, I do believe that you made no reference to the occurrence in the District Court that I refer to; that is, the government's having represented in the District Court that there had not been wire taps of any kind.

MR. VINCENT: You are absolutely correct, your Honor.

THE COURT: I was unaware of that aspect of the case when it was called to my attention before. At least, that is my memory.

MR. VINCENT: That is my fault, your Honor. I take the blame for it. That is my case. I was close to it, and I [62] apparently assumed that your Honor was aware of the Russo case because of the publicity it had received.

THE COURT: Well, I was indeed, but I never had seen Mr. Justice Douglas's short order on the stay, which was not entered until the 16th of August of this year, and it would seem to me that the government in that case made the very representation which it has resisted making in this case, and I should think that would be a difference between the two cases.

If you were counsel for the government in the Russo case, can you tell me, please, whether this representation, to the effect that there were no wiretaps used, was made as a result of court order, or was it just a voluntary representation?

MR. VINCENT: It certainly was not voluntary, your Honor, and it is strictly opposed to the policy and position taken by the Department of Justice. It was in effect –

THE COURT: What led up to the representation then? What is the background of the representation as to no wire taps in that case?

MR. VINCENT: Because I did not know the department policy, to be frank with you, your Honor.

THE COURT: But was it made under court order or just in the course of colloquy or argument?

MR. VINCENT: Well, it wasn't a direct order, but from the colloquy from the bench and between counsel for the witness and myself, it became very apparent that the judge might not follow [63] the law in the Ninth Circuit. The law in the Ninth Circuit is absolutely clear, and I thought the law was certainly sufficient, but this particular judge was indicating that he might not follow it.

THE COURT: Well, I was simply surprised to read in this copy that I got today for the first time that there had been a representation by the government in that case, and I am happy to learn the background.

MR. VINCENT: I take the blame, your Honor. It certainly was not intentional.

THE COURT: Well, have you something further now with respect to this matter?

MR. VINCENT: Not on the legislative immunity. On the point of the First Amendment, your Honor, I would just like to say that I don't want to reiterate all of my arguments in the Falk matter, but I certainly would like to point out that I believe that Dr. Rodberg stands on a much less solid footing than Dr. Falk in claiming a journalistic privilege under the Caldwell case, and I have heard nothing here or read nothing in the briefs submitted which would bring him under any rule of law under the First Amendment.

That is all I have, your Honor.

THE COURT: All right. Now we have rebuttal on behalf of the Senator.

MR. REID: May it please the Court.

[64] THE COURT: You are Professor Reid?

MR. REID: Yes. R-e-i-d.

I want to say by way of introduction that I don't intend to take much time. I think a great deal of his Honor's time has been taken in argument, and there is some question of whether or not it has been directed to the inquiries which

are raised, so briefly I would like to try to direct my attention to some of the several questions and inquiries which you have put throughout the morning and the various responses thereto.

I think it is important at the outset that we make – not only make but keep clear throughout this discussion the distinction flowing out of the speech and debate clause between confidential communications and judicial accountability, and at times we have said we recognize that but then the discussion has been interchangeable.

In terms, sir, of judicial accountability, there is a further question, judicial accountability in terms of balancing and protecting what kind of interests. The courts have not approached judicial accountability in terms of members of the House or members of the Senate in any absolute; it has been in terms of balancing the purpose of the legislative privilege as against the interest being affected.

Quite frequently it is difficult, and in some of the cases which were raised earlier this morning, the problem the Court is fighting is, Is its historical role to protect the rights of [65] the individual and the rights of the individual against arbitrary, capricious governmental action, and therefore, a collision between that function and the judicial overseeing of congressional conduct. I think, your Honor, that in terms of this clarity, the discussion in Powell is very helpful. I might say in passing that I have had some experience with the expansion of the speech and debate clause by being on the loose end of Dombrowski and Powell in terms of the speech and debate aspect, but there the court's power is very clear in terms of the interests being balanced and the limitation.

Briefly I would like to call your Honor's attention to United States versus Johnson, some language at 185, which deals with the specific problem that you addressed to counsel this morning, then again to government counsel. Nobody contends there is any absolute war growing out of the speech and debate clause as to the Senator or anyone else for criminal conduct. What is contended is that the operation of

the speech and debate clause, if there is a necessary nexus between the conduct and the legislative activity, there may then be a protection against criminal prosecution because of inability, one, to secure information, or two, to make him accountable for his conduct growing out of and a part of his legislative function, and that, of course, is what the court was talking about in Johnson. They sent it back and said he could be sent to jail under other circumstances and what have you, his account being bad.

[66] Now, your Honor, in terms of the accountability and lines that you were drawing this morning with my co-counsel in terms of the speech on the floor of the House and the Bar Association's meeting and beyond, I think that the problem is resolved by two considerations, the kind of interest which is being affected by the speech and the need for accountability, as well as its relationship to the legislative function, and obviously the legislative function is clearer where the speech is on the floor of the House; likewise when equally protected where it was in a committee hearing and committee activity and committee work.

In terms, then, I think it is material, highly material, in this situation that this activity involved occurred at a committee hearing. In terms of that aspect, your Honor, the Court is quite correct in its suggestion that it is improper and the Court is without authority to determine the propriety or impropriety, regularity or irregularity, of a subcommittee hearing.

In Powell the court goes even further. The court has in any other case no intervening into activities of the legislative branch, but even there, your Honor, there has been and continues to be a dinstinction between what the courts have referred to in a series of cases between internal management and external action. Of course, Marbury, that line of cases, when you got out of the legislative process, the finished product, the act that was resolved in the legislation, of course there is no [67] problem of judicial intervention and judicial review.

In terms of Powell, the exclusion from membership the court said was at the outer limits, but the court has reserved on the political question and other judicial terminology clearly a large group of activities on the part of the legislature which is beyond judicial scrutiny, regularity of votes, certification as to the voting, any number of problems.

We are not pressing that matter. Our not pressing it does not mean we concede the facts alleged by the government in terms of repudiation of Senator Gravel. We take the position, one, it is not the subject of judicial inquiry, and that is why we have not gone further into that matter. There has been no problem, there has not been any official act on the part of the Senator nor any repudiation on his part whatsoever, but I think the legal consideration here is the lack of power of the Court to inquire. That is, of course, a question of internal management, internal –

THE COURT: Well, we know that the courts make inquiry as to the scope and authenticity and credentials of committees in contempt of Congress cases and some other types of cases. It can be done.

MR. REID: But, your Honor, let's be clear, in terms of bringing into the picture the aid of the judiciary in the contempt cases, and that is where all those cases are, the question of whether or not the court would aid the legislature by [68] judicially imposed punishment as a result of contempt in the House, and at first the court would not put any limitation on congressional action that came quite late.

In order to protect the individual and balance the individual and the regularity of the legislative process, beginning, I think, with Thompson and subsequent cases, the courts for the first time imposed, as a protective shield, legislative purpose, regularity of meetings, and that kind of issue. In terms of what had been brought into question, that is the judicial question of contempt.

Now involved in that was not the activity of Congress and its prerogatives. Involved in those cases and contempt cases was whether judicial punishment ought to be imposed, and the court has refused to impose punishment without showing that it –

THE COURT: Let me ask you a question on some other aspects you touched on earlier. Is it not material, in your analysis, for the Court to consider the relationship between the legislative function of the subcommittee of the Committee on Public Works and the promulgation of these papers that related to the national security? Mr. Vincent has made the point that were this something done before the Committee on Foreign Affairs, he would consider it to be covered by the speech and debate clause, but he suggests that having been done before a subcommittee whose concern was far removed from public affairs, that the clause would not apply. What is your view on that [69] point made by Mr. Vincent?

MR. REID: Well, with a great deal of restraint, your Honor, my view is, he is in error.

THE COURT: Well, I don't think that surprises me. But why?

MR. REID: For a number of reasons, your Honor. The inquiry in the contempt cases was, of course, not the power of a particular committee to inquire, but what it had been authorized to inquire into. Even the legislative purpose there was one of authorization in order to call witnesses and testify, because you were balancing the private interest.

I think to go into the question here of the propriety or impropriety, legality or illegality, of this committee hearing in terms of appropriateness or inappropriateness, you have then sailed upon the sea of political thinking that the court warned against in Baker and Carr, and of course this has been involved ever since. The problem there would be one of germaneness.

Now, the question which the Senator raised was, of course, considered by him and others to have been highly germane to the Public Works Committee. Not only does this committee but a number of others have a great deal of activity in dealing with these particular problems, and it has, of course, the question of reordering those particular priorities. In order to do that, more and more other committees have gotten into the kind of expenditure, the kind of activ-

ity that we are engaged in, in the [70] foreign relations field and its impact on those particular programs. In fact, there have been some programs curtailed and affected.

THE COURT: My question really is, Is that consideration material to decision of this motion, in your view?

MR. REID: No, sir, and, as I say, I don't think the Court has power to inquire into it. The question is germaneness. But I want to merely point out that we are not contending that it was not germane, it was not the interest of this committee.

Your Honor, if I may say, the only reason I have gone into accountability is that I think it is important, but I don't think we ought to lose sight of actually what is involved in the posture of this case at this particular time, and that is not judicial accountability of an agent or the Senator, but confidential communication. At this particular stage, the government wants to do nothing more than to inquire from an aide and representative of the Senator, in terms of conduct and activity between the two. We say that the confidential communication growing out of inherent privilege and speech and debate, and we don't have to get into the question now of judicial accountability for the eventual act, but that this communication cannot be breached in this manner, and the posture of the government at this particular point is simply that.

The privilege of attorney and client, husband and wife, is not merely the communication aspect. It makes the agency problem [71] material. As Professor Wigmore has said in his treatise in terms of the privilege, the lawyer-client privilege, that obviously agents are included, because if you pierce the veil, at that point you have destroyed the communication. Also, your Honor, this husband and wife privilege is such communication, and may embrace and quite frequently embraces knowledge which has been obtained prior to the marriage, so it is the question of relating back in order to preserve the confidential communication.

I think also, because it gets to the response counsel made this morning to questions your Honor put in terms of the

materiality of Mr. Rodberg's conduct the 29th, the day after or the day before, and of course, I think we can concede that where lack of interest in inquiry into his conduct before the 29th, as long as it is in the present posture of invading the communication, because we have no way of measuring the limitation nor the reason for employment, or what have you, you may have a different answer altogether when you get to the accountability stage, but in terms of invading the communication aspect, it is, I would think, highly relevant that the –

THE COURT: Well, I don't want, as you already have suggested, to reargue the whole matter, but do I understand you take a different position than Mr. Reinstein, who argued first, that the grand jury could not properly inquire into events previous to the 29th? I thought he conceded that there could properly [72] be such an inquiry. I just want to be clear if you take a different position.

MR. REID: I don't understand, your Honor, that I am taking a different position.

THE COURT: Well, maybe not.

MR. REID: I gather his response was in the context of accountability rather than in terms of the context of privileged communication, and I am saying because of the privileged communication that we feel its sole purpose here, and the government hasn't denied this, is to pierce the veil of communication. That is the posture, and –

THE COURT: Well –

MR. REID: Sir?

THE COURT: He said, and I asked him specifically, I think, suppose questions were put only with respect to his activities previous to the 29th of June. I think he said, "Well, then, of course, we would have no objection." I think you now say that you might or that you would have objection, if I understand you correctly.

MR. REID: Yes, your Honor.

THE COURT: All right. I don't say what you must –

MR. REID: I am not as sharp as I was. We had a lunch break in between.

THE COURT: Well, maybe during lunch – at least I remember. I am happy to realize that I remember what occurred before [73] lunch.

MR. REID: We have all been highly impressed by your Honor's memory.

In terms of the legislative function, sir, I think no hard and fast rule can be made there either in terms of the operation of the privilege. I think what we are trying to say is that what was accomplished in this case, including the three steps that you referred to this morning, offering material as the republication and discussion with publishers, I think what we are dealing with here, of course, is a committee record, committee testimony, and the promulgation of that. Of course, we don't have to go to any republication, especially those in the field of libel and slander, where the court has been inclined to limit the privilege in order to protect the individual from the injury occasioned by imposition of the privilege involved in Matteo and Bigelow and other cases, injury to a private individual because of not being able to get relief as a result of the operation of judicial privilege. Your Honor is, of course, quite familar with the necessity of the confidential relationship and how that that could be pierced by inquiry into executive and legislative privilege.

May I say, sir, to conclude, our position, of course, is, that the operation of the speech and debate clause is such as to preclude the appearance of Mr. Rodberg before the grand jury, and therefore the motion to quash ought to be granted because [74] of the confidential relationship as well as the operation of the privilege.

Further, if it appears, however, that the Court feels the objection is premature, the problem, of course, in terms of whether it is timely or not, whether substantial injury occurs for which there is no further redress, the problem in this case, unlike others, in the grand jury room we would have someone purporting to assert the privilege of the Senator and to protect the Senator or not to protect him, as he felt free. The Senator, of course, would not be present, and

the only way, if the Court agrees that there is this protection, that it can be guaranteed and preserved in this kind of situation is, of course, to prevent, one, the appearance altogether, and if not, certainly we ought to be in the same stage before he is ordered to appear that we are after the questions have been propounded so that the Court might direct itself not only to the area of response but the area of inquiry by the government.

I would like to say in passing, of course, I don't know the procedure in this circuit, where I am permitted to practice, but I have had some experience with the Justice Department in its expanded use of the grand jury to help it in its investigatory function, and the mere fact that the earlier communications involved in convening the special grand jury have been found, it does not follow that they are available to counsel or to the public.

[75] The convening documents and federal inquiry into the Fred Hampton death of 1969 in Chicago are to this day sealed, even the convening order, and the question that we have noticed by what is suggested in the convening papers does not follow, because usually, following the Attorney General's Manual, they are stated in such broad and general terms that you would not understand what it is about.

Thank you, your Honor.

THE COURT: Yes. It is Mr. Stavis?

MR. STAVIS: Yes, sir. If the Court please, I shall be the last to address the Court, I think. On behalf of the attornies in this matter, I want to express our appreciation for the obvious patience and the interest the Court has had in this matter. Obviously these cases do present to the Court matters of enormous constitutional significance, and the concern of the Court is shown in dealing with and listening to the arguments, and we all appreciate it. I shall try to be very brief. I shall try not to duplicate specific points.

Directing our attention to the legislative immunity question, it is clear in the record that Dr. Rodberg's position is at the direct request of Senator Gravel. The first question which Mr. Vincent raises is whether the immunity extends

to members of the staff, and I suggest that Mr. Vincent seems – I would like to call to the attention of the Court a number of items: firstly, the brief submitted by the Department of Justice itself, [76] in which, on behalf of Mr. Sourwine, who is on Senator Eastland's staff, the Department of Justice said it is clear that the information sought from the defendant has been received by him pursuant to his official duties as a staff employee of the Senate. As such, the information is within the privilege of the senate.

So the shoe is on the other foot. The Department of Justice had no difficulty in conceiving that the speech and debate clause extended as well to staff employees of senators.

THE COURT: I didn't hear it quite completely. Was it staff employees of the Senator or the Senate?

MR. STAVIS: In that case it was a staff employee of a senate committee.

THE COURT: I see.

MR. STAVIS: It is quite clear that the speech and debate clause of the Constitution extends to the senator. It doesn't extend just to the Senate. It is very clear in its terms that it applies to the senator.

Secondly, the difficulty that Mr. Vincent has in extending this speech and debate clause to employees, he overlooks the fact that the question is, what are you going to ask the employee about? Obviously if Dr. Rodberg was to be inquired into with respect to some bank robbery that he may have witnessed, obviously the speech and debate clause doesn't extend to that, because that has nothing to do with his function with the Senate. In [77] fact, I suppose the Senator himself might be the subject of a subpoena with respect to an automobile accident that he saw at the corner. But if the issue, the subject of interrogation, concerns the speech and debate of the Senator, necessarily it extends to those who work with him on that speech and debate and when you are trying to reach the speech and debate through an employee.

I suppose if tomorrow I go to my office and interview a client and then do the dutiful thing of dictating to my secretary a memorandum of our conference, I don't suppose that the lawyer-client privilege can be just disregarded by a subpoena served on my secretary in which the grand jury would say, "And what did Mr. Stavis tell you that the client told him?" and that is what this is all about, because the guts of the inquiry is the speech and debate of the Senator.

Mr. Vincent spent a great deal of time saying senators are not immune from criminal responsibility. Of course, they are not. Nobody has even suggested that they are immune from criminal responsibility, but that doesn't happen to be what this case is about. The question is whether they are immune from being compelled to testify about a speech and debate, so any case which says that they are not immune from criminal responsibility is irrelevant.

Mr. Vincent says maybe the actions of subcommittee were beyond his power. Well, the Senate is a self-governing body. [78] It knows how to handle its own committees and subcommittees. It even has disciplinary power, and it really would be extraordinarily beyond the power of this Court, or any other court, for that matter, to step into that kind of question. I hear tell there is a good deal of contention between the Armed Service Committee and the Foreign Affairs Committee. Perish the thought that that question would be presented to this Court for adjudication to see whether or not each is staying within its bailiwick.

Mr. Vincent couldn't quite recall the case but he said there are some cases in the Supreme Court in which the Court says the Congress has to do its business pretty carefully if it expects us, the courts, to prosecute contempt of Congress. It has to delegate its power carefully. Resolutions on contempt must be careful, so on and so forth. Of course, the case is the Novak case, but the Novak case went a little further and said the only time we get concerned with how you run your business is when you come into this courtroom and ask us to prosecute somebody for something that he didn't do before a committee, but as

far as you do your own business and don't come into court to ask for our help, that is your affair. The court has no business intervening in the self-governing quality of the legislature.

Here the shoe is quite on the other foot, because the executive is now trying to move in against a senator and say, and we are telling you, we are telling you, in fact, we looked to [79] the court to make that decision for us, that he was acting outside his bailiwick. It would be a gross violation of the concept of separation of powers to do that.

Then we have the question of the loss of privilege, namely, it is all right to make a speech on the floor, to make it even in a committee, but if you start publishing speeches on the floor or in the committee, then you lose the privilege. Hentoff against Ichord, 318 Fed. Supp. 1175, at 1179, is directly to the contrary. There the legislative activities are not limited to speech or debate on the floor of Congress. Information in the report involves matters that concern the public, and the court will take no action which limits the use and individual congressmen is to make of the report or its contents on the floor of the Congress.

We are not talking about fund-raising speeches by congressmen. I am talking about the publication of a document which constituted a presentation which constituted the record of this subcommittee. I understand that the publication will be exclusively the record of the subcommittee. We cannot deal with the question of loss of privilege when that is the issue.

So much, it seems to me, needs to be said on the question of privilege, congressional speeches, and the debate privilege. I should like to spend just a few moments on the electronic surveillance question.

THE COURT: Well, now I am trying to think. Didn't I rule [80] on that?

MR. STAVIS: I don't –

THE COURT: Pardon?

MR. STAVIS: The matter is in our papers.

THE COURT: Oh, yes, I ruled on that at the hearing, and I cannot offhand recall whether you attended it or not, but this is on something that the –

MR. STAVIS: May I suggest –

THE COURT: What was it? Was it the first of – No, it was the 20th of August. I asked counsel for Dr. Rodberg what he had, if anything, along the lines of the matter of an affidavit or other indication that there had been any electronic surveillance – this was Mr. Reif – and he said that because he had stated in his affidavit that on information and belief, there were questions that would be based on electronic surveillance, and correct me if I am wrong, but he said he had nothing except a suspicion, and therefore I ruled on that at that time. He can correct me if I am wrong. Isn't that what happened?

MR. STAVIS: May I respectfully address myself to your question?

THE COURT: But let me ask this: Were you present?

MR. STAVIS: I was not.

THE COURT: Well, why don't we –

MR. STAVIS: I will ask Mr. Reif to address himself to that.

[81] MR. VINCENT: If I may answer the question, you denied the motion in regard to electronic surveillance.

THE COURT: I think I did.

MR. VINCENT: You did, your Honor. Mr. Reif will bear me out on that.

MR. REIF: Your Honor, that is correct. You denied the stay on the question of surveillance. It is our understanding that you did so on the basis of Mr. Justice Douglas's opinion in Russo.

THE COURT: Yes. I am sure I did, so I am not going to reopen that aspect of it.

MR. STAVIS: I wouldn't want to tax the patience of the Court.

THE COURT: You see, I did not do that in Professor Falk's case because his lawyer spoke about getting some

affidavits and so forth. There was just a distinction in the way the cases were treated. And I have heard Mr. Homans too, originally. I have heard all that can be – I have read these cases.

MR. STAVIS: I don't want to tax the patience of the Court. I did simply want to say that it had been our view that when you denied the motion in that respect, it was without the knowledge that your Honor acquired today, namely, that Mr. Justice Douglas's denial of the stay to Mr. Russo was based on a representation made in the District Court by the representative of the Department of Justice, who happened to be Mr. Vincent.

[82] THE COURT: Well, that is right. I didn't know that at that time, but that was not really the basis. I explained my basis then, and I just used Justice Douglas's language. You might say that I agreed with Judge Gibbons in the Third Circuit if you want to find the reasons for my ruling. So that is a matter apart.

MR. STAVIS: May I therefore proceed to the last point.

THE COURT: Fine.

MR. STAVIS: Which is the First Amendment point. Mr. Vincent dismissed it rather casually with respect to Dr. Rodberg by saying, on this journalistic privilege Mr. Rodberg's case doesn't approach that of Dr. Falk, because he hasn't published very much. It seems to me that there is a rather basic misconception, at least in Mr. Vincent's formulation, as to what the privilege is.

The question of journalistic privilege is a First Amendment privilege, and to approach this in terms of "Do you work for a daily newspaper or a weekly newspaper or a monthly newspaper? Are you a regular? Are you full-time? Or are you whatever else it is called?" misses the whole thrust of what the Court itself recognized this morning was an emerging recognition of the singular role of the First Amendment in its relationship to some of these grand jury proceedings.

What I would like to suggest, your Honor, is that just as courts have recognized this emerging role, so must the

courts recognize the emergence in recent years of what amounts to a [83] new kind of profession, which I would like to call the scholar-communicator or the journalist-communicator. It is a development, your Honor, roughly since World War II. Scholars today do not live in the ivory tower or sit in the library publishing their findings only in learned journals that are read by their colleagues and then get lost. The scholar-communicator is the scholar who communicates to the public and contributes to the education of the public, as has indeed the journalist in our society.

That communication, your Honor, has been to the public and, as clearly noted in the affidavits of Dr. Rodberg as well as Professor Falk, these are communications to the legislative body, which is, after all, the center of the development of legislative policy in this country. It is fair to say that there has emerged a new professional identity.

Interestingly, your Honor, some of the individuals who function as the scholar-communicators function as individuals, but in large measure, some of their activities have become institutionalized in institutes, so that, for example, you find Dr. Rodberg, as the affidavit shows, is engaged by the Institute for Policy Studies; Dr. Falk is engaged by the Center for International Studies.

Creation of these institutes, which, incidentally, happen to enjoy tax exemption from the United States income tax laws, is itself a recognition of the public interest, the public [84] interest in the on-going, continuing role of the kind of scholarship and communication that these people engage in.

What is the reason for the emergence? And I suggested that this emergence has occurred only since the end of World War II, the reasons for the emergence of this new kind of professional identity. Largely, I think it reflects an enormous increase in executive power, particularly employed secretly, and for that reason the unique contribution of these scholar-communicators is that they have been

tearing away the veil of executive secrecy so as to inform the public and the legislators as to what is happening.

THE COURT: Excuse me. Don't you think you are going a bit beyond rebuttal? I don't remember Mr. Vincent talking about this matter.

MR. STAVIS: May I have just two more minutes, your Honor?

THE COURT: All right.

MR. STAVIS: Because I would like to relate to your Honor the role of the grand jury and the role of the grand jury proceedings against these scholar-communicators, your Honor. Who would recognize, who would recognize the supposed grand jury proceeding as constituting a shield to the public against the over zealous prosecutor? The reality of this grand jury proceeding is that it is a weapon, a weapon of a secret hearing sought to pick off, to harass, the very group of individuals who more so than any other group have contributed to the emerging [85] public understanding of the nature of the issues with respect to the Vietnam War, and the use of the secret proceeding is designed to extend the entire concept of executive secrecy in the development of policy.

The issue, therefore, comes back to the formulation which Mr. Vincent tried to employ but which I suggest misses the point. The question is not whether Dr. Falk or Dr. Rodberg is or is not a journalist, though it happens that Dr. Rodberg has listed for me a whole series of things that he has in fact published: One, two, three, four, five books, articles in Look Magazine, the Washington Post, everything.

That is not the question. The question is the characteristics of the operation of the First Amendment privilege to prevent the employment of the secret grand jury process, employment of it as a device to throttle, throttle communication to the public of matters of public interest. That is what Caldwell was about, and that is what these cases are about.

Thank you very much, your Honor.

THE COURT: Well, I have indicated already that I won't be deciding these motions off the bench. I want to read some of these cases and consider some of these arguments.

Since nothing more remains to be done, I expect, we will adjourn until Monday morning at nine-thirty.

[Thereupon the hearing was concluded.]

VOLUME 3

[1] UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

EBD 71-172-G

UNITED STATES OF AMERICA

vs.

JOHN DOE

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 7, Federal Building, Boston, Massachusetts, on Tuesday, October 12, 1971.

APPEARANCES:

Warren P. Reese, Esq.,
Chief Assistant United States Attorney,
Southern District of California,
appeared for the government.

Robert Reinstein, Esq.,
appeared for Senator Mike Gravel.

James Reif, Esq.,
appeared for Leonard Rodberg.

[2] PROCEEDINGS

THE COURT: Good afternoon, gentlemen. Before resuming the patent case – please stay where you are – I hear that counsel in the Senator Gravel/Dr. Rodberg case

are here, or some of them are here. Is anyone here on behalf of the government?

MR. REESE: I am here appearing for the government, your Honor. My name is Warren Reese. I am Chief Assistant United States Attorney from the Southern District of California. I am on temporary assignment to this case.

THE COURT: Well, I received the motion for reconsideration. I have read the memo but not as carefully as I expect to, nor have I had an opportunity yet to read the cases. I will not have oral argument on this motion. I will, however, withhold decision until the government has had an opportunity to file a reply memo, if it wants that opportunity.

MR. REESE: Thank you, your Honor.

THE COURT: I would welcome a reply memo from the government. How long do you think – Have you seen the memo filed on behalf of the senator?

MR. REESE: Yes, I have, your Honor.

THE COURT: And do your expect to file a reply?

MR. REESE: It was my intention to, yes, your Honor.

THE COURT: How long do you think you would need?

[3] MR. REESE: Well, I suspect I would need perhaps two days. I am thinking of –

THE COURT: Well, we will make it Friday.

MR. REINSTEIN: If I may, your Honor.

THE COURT: Pardon?

MR. REINSTEIN: If I may.

THE COURT: Just a moment. I just want to be sure that Mr. Reese – You will have your memo in, then, by Friday.

MR. REESE: Yes. I can do that, your Honor. Incidentally, I should advise the Court that Dr. Rodberg has been subpoenaed to testify before the grand jury on Thursday. This subpoena was issued after your Honor entered his order disposing of the motion.

THE COURT: Well, can his appearance be continued until next week?

MR. REESE: It can be continued until a subsequent time, your Honor, unless next week is a preferable time

for your Honor's convenience.

THE COURT: Well, what is today, Tuesday?

MR. REESE: Yes, your Honor.

THE COURT: Well, why don't you – Well, I would have to have your memo by tomorrow, late afternoon, in order to consider it. It is up to you whether to get a memo in tomorrow afternoon and permit the subpoena to stand subject to further order, or to get the reply memo in on Friday and continue Dr. [4] Rodberg's appearance.

MR. REESE: I think the latter, your Honor, is the desirable course to take. Next week may not be an opportune time, but sometime subsequent to Thursday, and after your Honor has had an –

THE COURT: All right. At least, he is excused from appearing on Thursday, and the stay entered back in September or late August – I have forgotten which – when he was first subpoenaed is now reinstated, so that he may not be called until further order of the Court. And I will look for the government's reply on Friday.

Now you had something else to say?

MR. REINSTEIN: Well, you took care of it, your Honor.

THE COURT: Yes.

MR. REIF: Your Honor, my name is James Reif. I represent Dr. Rodberg. From the way your Honor phrased it, I wasn't sure whether your Honor had received the papers we filed this morning as well. We filed a similar motion and memo as well.

THE COURT: Oh, no, I haven't. All I have here is a motion on behalf of Senator Gravel and a 29-page memo in support of the motion, but you filed similar papers?

MR. REIF: Yes, at about 9:30, and the woman informed us that your office would receive them as soon as you came in.

THE COURT: Well, I just haven't seen them as yet, but [5] if the government wishes to reply to them, the Friday date applies to the motion of Dr. Rodberg as well.

MR. REESE: Thank you, your Honor. May I have an indication of when your Honor expects he may render a decision in this matter?

THE COURT: Well, of course, three weeks ago Friday when I heard you gentlemen on the original motions to quash and specify, I felt I would be coming down with a decision the following Monday or Tuesday, and it was almost three weeks thereafter before I did, so I just cannot predict. I would not expect it would be that long, because I have read so many of the cases cited in the memo, but I want to reread some of them in the light of the arguments here presented, so I am just not going to predict, however, when I will issue a decision, but I hope – I am confident it won't be as long as three weeks, which it was the last time.

MR. REESE: Thank you, your Honor.

THE COURT: So that is the program on these motions.

MR. REESE: Your Honor, for the edification of the Court, I should state that the government has absolutely no intention of interrogating either Senator Gravel or any other member of his staff regarding the speech he made on the 29th of June during a meeting of the subcommittee.

THE COURT: Well, anything you wish to state along those lines I do think is better stated in writing, just so there [6] will be no misunderstanding. You are going to be filing a memo, and such representation as you wish to make along those lines I think should be incorporated in the memo.

MR. REESE: Thank you, your Honor.

MR. REINSTEIN: Before withdrawing, may I just apologize to you for some of the typographical errors that appear in that brief. The time in which we were working was so limited that the normal proofreading –

THE COURT: Well, I am not going to decide it on the basis of any typographical errors, I am sure. So that is fine, and that is the end of the proceedings in this matter, and we will resume in the patent case.

MR. REESE: Thank you, your Honor.

MR. REINSTEIN: Thank you, your Honor.

MR. REIF: Thank you, your Honor.

[Thereupon the hearing was concluded.]

VOLUME 4

UNITED STATES OF AMERICA

District of Massachusetts

UNITED STATES OF AMERICA	)	
	)	
v.	)	EBD 71-172-G
	)	EBD 71-209-G
JOHN DOE	)	

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 2, Federal Building, Boston, Massachusetts, on Wednesday, October 27, 1971, and Thursday, October 28, 1971.

APPEARANCES:

Richard E. Bachman, Esq.,
Assistant United States Attorney,
appeared for the government.

Robert Reinstein, Esq., and
Charles L. Fishman, Esq.,
appeared for Senator Mike Gravel.

[2] PROCEEDINGS

THE COURT: Would counsel come up, please, in the emergency matter. Here is a note I have: "Witness: Webber." Mr. Bachman's problem, which is in the note he wrote to me, is that Mr. Reese is en route to Boston from San Diego. As soon as Mr. Reese arrives, the government is prepared to have a hearing, but in Mr. Reese's absence, Mr. Bachman feels he may not be sufficiently familiar with the proceeding, and there is the way the matter stands.

What I could do is hear you during an afternoon recess or sometime. Has anyone filed an appearance or filed an affidavit or anything on Mr. Webber's behalf?

MR. REINSTEIN: No, your Honor.

MR. FISHMAN: We understand Mr. Webber is out of the country. This is one of the reasons we only discovered Mr. Webber has been subpoenaed by the government to appear before the grand jury.

THE COURT: Well, query, whether there is any matter that could be ruled on short of Mr. Webber's being served.

MR. REINSTEIN: Your Honor, Mr. Webber was served before he left the country.

THE COURT: I see.

MR. REINSTEIN: And was ordered to return tomorrow to appear.

[3] THE COURT: By whom?

MR. REINSTEIN: By the United States Attorney. I believe that subpoena was signed by Mr. Vincent, I am not sure. We have just received word very recently that he was – that this all transpired sometime ago, and that he is expected back in the country tomorrow and expected to appear before the grand jury tomorrow. We have, your Honor, no knowledge of his disposition. For all we know, your Honor, he may be prepared to appear and testify without objection on his part. However, on the part of the senator, we have objections to raise.

We also have information, as you can see in our motion for further relief, your Honor, which raises some serious questions on two scores. One is with respect to the interpretation of your Honor's order of October 4th as to what matters may be inquired into and what matters may not be inquired into before the grand jury. We have information which indicates that the government plans to call witnesses before the grand jury, both today before they cancel and tomorrow, to inquire into matters which we are firmly convinced violate your Honor's order of October 4th.

The government also indicated to us that it is calling witnesses before the grand jury, one of which is Mr. Webber, to testify with respect to matters that are presently under consideration by your Honor in a motion for rehearing. It is [4] our understanding that those matters also should not be inquired into prior to your Honor's ruling in that matter.

THE COURT: Well . . .

MR. REINSTEIN: We would be . . .

THE COURT: I understand the grand jury is not sitting today, for one thing.

MR. REINSTEIN: That is correct, your Honor. It was cancelled.

THE COURT: And I have set a hearing . . . What is today, Wednesday?

MR. FISHMAN: Wednesday, your Honor.

THE COURT: . . . for Friday in the matter of one witness named Mrs. Marx, I believe. I could schedule a hearing for tomorrow morning but, as I say, I am reluctant to keep you over.

MR. REINSTEIN: Would your Honor grant a restraining order until such time as he has heard and decided the motions so that witnesses are not before the grand jury giving the very testimony we seek to prevent while we are arguing?

THE COURT: I will act in any matter only on the basis of a written motion. That is the first thing. I won't . . .

MR. FISHMAN: We have filed a motion for a stay, your Honor.

THE COURT: I have here a motion to quash or stay, a motion to intervene.

[5] MR. REINSTEIN: Yes. And a motion for further relief, your Honor.

THE COURT: Yes. I have the three motions right here. Well, all I can say is that I don't know, without having read them further and giving them further study.

MR. FISHMAN: Your Honor, it will be acceptable for us if a hearing were set for tomorrow morning. We will be glad to stay over in Boston. It is not that inconvenient.

THE COURT: Well, yes.

[The Court conferred with the clerk.]

THE COURT: Here is what we will do. I have too many things scheduled between nine and ten o'clock tomorrow morning. Therefore, we will have to see whether we go forward with Mr. Bachman. All I can say is, I will look

at these papers, I will look at these other matters, which I have already to some extent, of course, and I will just simply have to let you know through Mr. Moynahan. I frankly don't know what I will do at this moment, but I will think of something.

MR. REINSTEIN: Regardless of the time or circumstances, your Honor, we would appreciate an opportunity for short oral argument before your Honor on the matter.

THE COURT: Well, I will let you know as soon as I can, probably shortly after one and shortly before two, as to just what I will do in the way of scheduling a hearing, in the way of ruling on these matters, or in some other respect. I just [6] frankly am not sure at this juncture as to just what I can do. There are other matters either in progress or assigned. Mr. Moynahan will let you know.

[Thereupon the hearing was concluded.]

UNITED STATES DISTRICT COURT

District of Massachusetts

UNITED STATES OF AMERICA	)	
	)	
v.	)	EBD 71-172-G
	)	EBD 71-209-G
JOHN DOE	)	

Proceedings had in the above entitled cause before the Honorable W. Arthur Garrity, Jr., Judge of said court, in Court Room No. 2, Federal Building, Boston, Massachusetts, on Thursday, October 28, 1971.

APPEARANCES:

Warren P. Reese, Esq.,
Chief Assistant United States Attorney,
Southern District of California,
appeared for the government.

Robert Reinstein, Esq., and
Charles L. Fishman, Esq.,
appeared for Senator Mike Gravel.

John Evan Jones, Esq.,
appeared for Howard Webber.

[2] PROCEEDINGS

THE CLERK: Emergency Business Docket No. 71-209, United States versus John Doe.

THE COURT: Good morning, gentlemen. For the record, please state your names and the clients whom you represent.

MR. REINSTEIN: My name is Robert Reinstein. I am a member of the Maryland bar and have been previously admitted to practice in this matter. I represent Senator Mike Gravel. With me representing Senator Gravel as co-counsel is Charles Fishman, who is a member of the bar of the District of Columbia and has also been admitted to to practice in this matter.

MR. REESE: Warren Reese, appearing for the United States, your Honor.

THE COURT: All right. The matter that is actually set for hearing is this motion pertaining to a subpoena presumably served on a witness, Howard Webber. However, I think that these other motions filed on behalf of Senator Gravel relating to the subpoena served on Mr. Rodberg probably should be heard today also. Have you any different view, Mr. Reese?

MR. REESE: No, your Honor.

THE COURT: All right. Well, that is that. Now let me ask that counsel address themselves first to this motion to quash or stay the subpoena on Mr. Webber. We have heard nothing from the government on this. Perhaps I should get [3] some statement as to the facts from Mr. Reese. There was something stated on counsel's understanding yesterday that Mr. Webber was coming back to this country and would be here today. Is he available, Mr. Reese?

MR. REESE: He is, your Honor. He is in Boston.

THE COURT: He is in Boston. Maybe he is here in the court room.

MR. REESE: He is not in this court room, your Honor, but he is in Boston.

THE COURT: Incidentally, in the past I have asked that any member of the grand jury not attend these hearings. Is there any grand juror here? because I would want him to leave if there were.

[No response.]

THE COURT: Well, I will consider, then, these motions, perhaps first with respect to Mr. Webber, although it might be well for the Court to state that on consideration of these memoranda of law filed in the Rodberg matter, the Court plans to, although it has not actually, endorse a denial on Senator Gravel's motion for reconsideration. The Court wants to hear argument, however, on the matter of the second part of that motion, having to do with a motion to stay the order.

So now I will hear either Mr. Reinstein or Mr. Fishman.

MR. REINSTEIN: Addressing ourselves first, your Honor, to the Webber matter, we have filed a motion to intervene with [4] respect to the subpoena at issue on Mr. Webber, and we have also filed a motion to quash or to stay the grand jury subpoena.

Our motion to intervene and the motion to quash and stay is primarily on the same basis as in the Rodberg case, and we ask for the same relief. It is our belief that Mr. Webber has been called by the government to testify before the grand jury concerning the attempts by Senator Gravel to have the record, the official record, of the Senate Subcommittee on Buildings and Grounds, which was compiled on June 29th, published and made available to the public.

Your Honor has in the record of the Rodberg case an article in the Boston After Dark, a three-page article which describes in great detail Mr. Webber's role as Director of the MIT Press and negotiations on the publication of the subcommittee record which were held between Mr. Webber

and Senator Gravel and members of his staff. Your Honor has already relied on these articles in the Rodberg matter, and we would like to incorporate them herein.

The precise issue, therefore, is whether or not the grand jury may inquire into actions by a member of Congress to make available to his constituents or the public by republication an official record of a Senate subcommittee. This is, of course, a matter your Honor has under reconsideration in Dr. Rodberg's case and which your Honor has now advised us that he intends to deny.

[5] THE COURT: Right.

MR. REINSTEIN: Because of the complexity of the issues, your Honor, and the fact that at the very least, we believe some of the cases, if not all, that we have cited in our memorandum of law give support for our position, we would ask for a stay in both the Webber case and the Rodberg case pending appeal. The problem, of course, is that we have no control over the witnesses. There is no means at all for Senator Gravel to obtain appellate review on this very, very important question except by a stay being issued by your Honor or by the Court of Appeals pending an appeal.

As we pointed out, the Supreme Court held in the Peflman case that denial of a motion to quash a subpoena with respect to an intervenor, such as Senator Gravel in this case, is a final order and is appealable under 28 U.S.C., Section 1291. We are not asking, therefore, for certification; we are simply asking for a stay pending appeal.

This precise issue has never really before been presented to the Courts of Appeals or to the United States Supreme Court, and all of the cases which were cited by both ourselves and by the government relate to libel cases. A civil suit in a libel context is different, given the historical underpinnings of the speech and debate clause. Therefore, in order to present Senator Gravel's legal position to appellate courts in a manner in which it can be decided by them and is not [6] mooted by these witnesses' appearing before the grand jury and deciding, as they very well may,

to answer questions posed on republication, it is essential that a stay of the subpoenas be granted.

THE COURT: Let me hear from Mr. Reese. I will get back to you on other points, but I would like to get, preliminarily at least, the government's view on these motions.

MR. REESE: Well, your Honor, it appears that the motions have been stimulated or motivated by the protective order which was included in your Honor's order denying the original motion to quash, and that the senator desires to be given some sort of supervisory control, some surveillance, if you will, of the government's investigation, the grand jury's investigation, so that he can be sure that the protective order is not violated.

THE COURT: Well, that is not the principal point of the senator, as I understand these motions. The principal quarrel that he has with the Court's protective order is that it does not forbid inquiry into the republication.

MR. REESE: Yes, your Honor.

THE COURT: That is not the only point on which he wishes to appeal, at least the clearest point. Now what I would like you to comment on is whether you consider that there is any method of obtaining appellate review of this Court's order other than the way suggested by Mr. Reinstein, or whether you [7] feel that the matter is so lacking in substance as not to be appealable. I don't know what your position is on this matter.

MR. REESE: Well, our position more nearly approximates the latter proposition that your Honor just stated. We don't feel that the order is final or appealable. Neither do we feel it is worthy of certification. The senator has not yet been affected by any act of the government, and I suggest to your Honor that he would not be affected until such time as any evidence obtained through this grand jury investigation was sought to be used against him in an administrative or judicial proceeding, whether criminal or civil.

I don't mean to suggest by that statement that we entertain the use of any such evidence against him, but it seems to me that he has not been injured as a consequence of

questioning which takes place before the grand jury, and consequently, your Honor's order does not at this point have such operative effect as to impose any injury or disability on him and it will not unless and until the order is disobeyed, and we certainly don't intend to disobey the order, and if evidence is elicited, if and when it is used in such a way as to affect Senator Gravel's legal status. His status has not been affected at this point.

THE COURT: I am far from clear that the speech and debate clause prohibits only use. It speaks in terms of inquiry, you see. Any inquiry is forbidden, not just any use.

[8] But let me get back to Mr. Reinstein, please, on a different aspect of this matter.

MR. REESE: Yes, your Honor.

THE COURT: Well, I would rather talk just to Mr. Reinstein, although I will hear Mr. Fishman later if you want or if you have something not covered by Mr. Reinstein.

I am not clear that the Perlman case is applicable in this circumstance, and I would like you to discuss Perlman a little bit further.

MR. REINSTEIN: Yes, your Honor.

THE COURT: Do you have an appealable order? That is one question I have. The second question I have is this: I don't think that Mr. Webber's situation is the same as Dr. Rodberg's; that is, the relationship is not the same. The reason for the Court's permitting Senator Gravel to intervene in the matter involving Dr. Rodberg was the same as the California court in Caldwell.

Caldwell was an employee of the New York Times. The New York Times was permitted to intervene. Dr. Rodberg was on the personal staff of Senator Gravel. He was not in every respect but substantially in the same position as was the New York Times in the Caldwell case. We are lacking that relationship here. Query, whether Senator Gravel has a relationship to Mr. Webber which would warrant his intervention.

So those are two questions I would like you to speak to, [9] the right to intervene, and secondly, whether you do

have an appealable order, short of a court order directing Mr. Webber to testify, or some order beyond what you have stated you believe would be a sufficient basis for appeal.

MR. REINSTEIN: Well, your Honor, first, on the intervention, our basis for moving to intervene in Dr. Rodberg's case was that Senator Gravel's legal rights were being threatened by the grand jury proceeding. It wasn't merely that Dr. Rodberg was an employee or agent of Senator Gravel, but that the grand jury inquiry was directed to Senator Gravel, and we believed that that inquiry was barred by the speech and debate clause.

Now, in your Honor's protective order, your Honor forbade the questioning of any witness, not just Dr. Rodberg, with respect to subject matter which your Honor held was barred from inquiry by the speech and debate clause. Therefore, it seems clear to us that Senator Gravel's rights in the Webber case stand on exactly the same footing as in Dr. Rodberg's case because our claim is essentially identical, that is, that a witness is being called before the grand jury and the government intends to ask him questions about matters which we believe they cannot do constitutionally.

We have no control over this witness. We have certainly less control over Mr. Webber than we conceivably could have over Dr. Rodberg. If Mr. Webber decides to enter the grand [10] jury room and testify about these matters – and we feel that this is a violation of the speech and debate clause – in that event the Constitution will be violated, and there is no subsequent remedy for that violation, because the constitutional violation, as Mr. Rodberg pointed out before, is the inquiry itself.

Indeed, in United States versus Johnson, when Johnson made a motion to quash the indictment because the grand jury had elicited impermissible evidence, the Court of Appeals ruled the indictment could not be quashed on that basis. So even if we accept Mr. Reese's suggestion that some rule might be fashioned, if the government decides to continue its inquiries in criminal proceedings against Senator Gravel,

there in fact is not even a proper exclusionary rule, but in any event, the point of the speech and debate clause is to prevent the questioning itself, to prevent harassment, and it extends to the principle of separation of powers, which prohibits judicial inquiry into the matter under protection.

The issue in Mr. Webber's case is the same as one issue in Dr. Rodberg's case, and that is whether or not the grand jury may inquire into activities of Senator Gravel in attempting to have published the official record of a Senate subcommittee. That is certainly a very substantial question for the appellate court, and I suppose that brings me to the question of the appealability of denial of the motion to quash, and discussion [11] of the Perlman case. Actually, your Honor, the Perlman case also involved intervention, and I think it supports our motion to intervene as well.

What happened in Perlman was that Perlman was involved in a civil suit in which certain of his property was obtained by discovery and then introduced into evidence, and one of the lawyers in the case had possession of the property. The United States Government then decided to investigate Perlman for alleged violations of federal law before the grand jury, and a subpoena was issued directed to the lawyer who possessed Perlman's property. The lawyer did not dispute the subpoena. The lawyer was quite willing, as Mr. Webber may be in this case, and Dr. Rodberg, to appear before the grand jury and, in that instance, to turn over the property.

Perlman then filed a motion to intervene in the District Court – I believe it was then called Circuit Court – and Perlman moved to quash the subpoena and to obtain his property back. His arguments were two-fold on intervention. One was proprietary argument, that he had a proprietary interest in the property, but the other, which was the more fundamental argument and the only one discussed on the merits by the Supreme Court, was that the subpoena itself violated Perlman's Fourth Amendment rights, in that it amounted to an unlawful search and seizure.

The Supreme Court held, first, that on either basis, [12] Perlman had a right to intervene, and second, the Supreme

Court held that the denial of the motion to quash the subpoena was a final, appealable order. The government's arguments in that case were, I think, identical to the argument set forth here by Mr. Reese, that Mr. Perlman should have waited until the proceedings were completed and the constitutional harm done and then try somehow, in some unspecified way, to get his property back and to somehow remedy what he contended was unlawful search and seizure, and the Supreme Court held unequivocally that Perlman had a right to appeal and that it was a final order and not interlocutory.

We have also called your Honor's attention in our reply brief to numerous cases in the Circuit Courts of Appeals which have established the proposition, particularly in cases like this where third parties who were intervenors are concerned, that where one of those third parties or intervenors is asserting a legal interest in either a subpoena issued by a grand jury or a subpoena in a civil case, and a motion to quash is denied, or, for that matter, granted, even though both of these actions are normally not appealable under Section 1291 as final orders, they are if that party can show that there is no alternative means of securing appellate review before the constitutional harm is consummated and there is no means of redressing them.

That is precisely the case that we have here. If the grand jury is permitted to go ahead and question Dr. Rodberg [13] and Mr. Webber about the question of republication, and they in their discretion decide they would not wish to be held in contempt of court and will therefore answer these questions, there is no way for us to file an objection, since Senator Gravel has no right, nor his representative, to be inside the grand jury room.

There is no post hoc exclusionary rule that can remedy the harm done, and if we are right that this is prohibited by the speech and debate clause, there will be a constitutional violation and it will turn into a fait accompli. As a matter of fact, it would seem to me that at that point the case would be entirely mooted and we could never take an

appeal, given the United States versus Johnson, from what the grand jury did even should the government decide later on to continue its criminal proceedings against Senator Gravel.

THE COURT: Now I would like to put a question, but since you have said three times that these proceedings are against Senator Gravel, I am constrained to say that I have never observed any indication in any of these papers that this proceeding is directed against Senator Gravel.

MR. REINSTEIN: By directed against Senator Gravel I meant, your Honor . . .

THE COURT: There are inquiries being made of things that he may have participated in, of perhaps not, but surely I have never seen any indication that he is a subject of any grand [14] jury investigation. I think that should be noted.

MR. REINSTEIN: Well, your Honor . . .

THE COURT: I haven't seen any such indication.

MR. REINSTEIN: Yes. I am not suggesting, your Honor, that the government intends to indict Senator Gravel. I wasn't suggesting that. The point I was making . . .

THE COURT: Well, I know what point you were making, but I think you may be overstating just a little bit the . . .

MR. REINSTEIN: Well, the grand jury is part of the institution of criminal proceedings, your Honor.

THE COURT: Well, I would not have mentioned it except that you said three times that there was a grand jury proceeding against Senator Gravel. I just don't think the evidence supports such a characterization.

Let me ask this . . . two things: I am considering granting a stay for a short period of time, such as a week or ten days, during which time an appeal might be taken and a further stay granted by the Court of Appeals. That is at least a possibility here. Do you think that there is a proper distinction drawn between Mr. Webber and Dr. Rodberg on the basis of Dr. Rodberg's having filed statements in briefs and in oral argument through counsel to the effect that he feels duty-bound to resist the grand jury subpoenas?

Here is what I have in mind: Any doubt as to the appealability of any order that I might make would be removed

should [15] I order Dr. Rodberg to testify, and perhaps, should he refuse to testify, the Court would entertain, if the government wants to seek one, an order that he be held in contempt, which motion I would act on, but should I make such an order, a stay would be more likely in such a situation . . . would be likely, let me put it that way, in such a situation, and there would be no question as to the appealability of such an order.

I do feel that there may be a distinction here with regard to the senator's rights in the Rodberg matter and in the Webber matter, and I would like to hear your view of that. Hasn't Dr. Rodberg already gone on record in these proceedings to the effect that he considers, due to his being a member of the senator's personal staff, he is duty-bound to refuse to answer these questions? Why shouldn't the Court proceed on that basis?

MR. REINSTEIN: Your Honor, I don't think Dr. Rodberg has ever represented to the Court that he will not testify before the federal grand jury. We do not, of course, represent Dr. Rodberg. Senator Gravel has no legal power over Dr. Rodberg. Given the secrecy of the grand jury proceedings, we are not even in a position to be able to find out after the fact exactly what happened in the grand jury proceedings.

Your Honor possibly may be correct. I honestly don't know. I have not discussed either Dr. Rodberg or his counsel what he intends to do should all of his motions be [16] denied and another subpoena served on him or an order served on him to appear before the grand jury. It does seem to me, however, your Honor, that it may be impermissible speculation to assume that Dr. Rodberg will not answer those questions upon the threat of a contempt citation against him.

With respect to Mr. Webber, I suppose your Honor is suggesting that the appealability in Mr. Webber's situation is probably stronger than in Dr. Rodberg's, and . . .

THE COURT: No. I am suggesting only that the appealability of . . . an order directing Dr. Rodberg to testify or

adjudging him in contempt for refusal to testify is clearly appealable.

MR. REINSTEIN: Yes, your Honor.

THE COURT: There you remove any doubt about the Perlman applicability. What about a stay of a short period of time, perhaps one week, subject, of course, to a further stay being granted by the Court of Appeals? How long would you need to appeal an order of this Court? You would appeal it promptly, I would assume.

MR. REINSTEIN: Yes, your Honor. We would appeal almost immediately.

THE COURT: Well, let me ask Mr. Reese some questions about this matter. One of them I neglected to ask before is whether or not Mr. Webber is represented by counsel of his own selection.

[17] MR. REESE: Yes, he is, your Honor.

THE COURT: And who is his counsel?

MR. REESE: Mr. John Curtin, who has his office here in Boston.

THE COURT: Is Mr. Curtin present in the court room?

MR. REESE: No, he is not, your Honor.

MR. JONES: I am associated with Mr. Curtin. I haven't had an opportunity to discuss the case at any length with Mr. Webber, since he has just returned from out of the country.

THE COURT: Well, there has been no appearance filed. I just wondered if he had separate counsel, which he evidently has.

MR. JONES: Yes, your Honor.

THE COURT: Thank you. What now are your comments, Mr. Reese, on these points made by Mr. Reinstein? if any. I am not requiring that you do so. You have already stated the government's position generally, but I wondered if you had any particular points to raise in response to Mr. Reinstein.

MR. REESE: I don't think I can offer anything new, your Honor. We feel, as I have indicated, that the speech and debate clause is concerned with a congressman being

called to account for conduct, as distinguished from being protected from questioning in an interrogating setting, so to speak, but I want to confirm that the government entertains no idea of proceeding against Senator Gravel. That is simply not probable in this case at all.

As far as the witness Webber is concerned, certainly the [18] subject matter of his testimony could not logically be limited in any event to statements or conduct of a staff member of Senator Gravel regarding a mission that he might have been on as a representative of Senator Gravel for the purpose of publication of the Pentagon papers. There are other factual components which we have a legitimate interest in which might be forthcoming from the witness Webber which have absolutely nothing to do with this contact with a representative of Senator Gravel's staff.

THE COURT: Well, that introduces a new element, you see. It has been assumed by the senator's counsel, and also by the Court, that your interest in Mr. Webber related to the conversations between him and Dr. Rodberg that were described in that Boston newspaper article. To the extent that your inquiries of Mr. Webber have to do with other matters than republication of the senator's incorporation of the Pentagon papers into the subcommittee file, well, then, I expect different considerations would be controlling.

MR. REESE: Well, your Honor, I didn't want to suggest that there was an obviously separate area of inquiry. I must in fairness concede that the other areas of interest to us are ancillary, so to speak, or originated from the contact made by the senator's representative.

THE COURT: Well, thank you.

MR. REESE: So they are not that easily segregated.

[19] THE COURT: I just wanted to ask. Mr. Fishman had some point. I don't want you to just repeat something Mr. Reinstein said. If you have some separate point to make, however, I will hear you, as I said I would.

MR. FISHMAN: With respect, your Honor, to the question we are dealing with, it seems to me, there are three basic points I would like to make fairly clearly. The first

is that the issue before your Honor I submit does not revolve around the status of Mr. Webber or Dr. Rodberg, but revolves around the point the Court made earlier, which is whether or not under the speech and debate clause there can be an inquiry.

If that is the key, inquiry, prohibition of inquiry, it doesn't seem to matter what the relationship is between people so long as they have privileged knowledge. Dr. Rodberg does have privileged knowledge, as the Court has recognized. Mr. Webber does have privileged knowledge, as counsel for the government just stated. If in fact we are correct, the republication is protected. That is the basis upon which we seek to intervene, not the status of the parties, but the nature of the inquiry sought by the government.

The second point is on the question of appealability. In the Perlman case, the court specifically said that the only reason Perlman's appeal was allowed was the absence of any other remedy to Mr. Perlman; if he was going to raise the question at all and secure a ruling on his constitutional [20] point, the only way that could happen is if the court took the order as a final order for purposes of the federal statute.

We have precisely the same question here. It is a functional approach. If this Court should hold that the order is not appealable, then there is no other vehicle by which the senator can raise the question. There is an absence . . .

THE COURT: That is a point that was pretty well discussed by Mr. Reinstein. I don't want a rehash of Mr. Reinstein's argument but whether there was something separate you had in mind.

MR. FISHMAN: No. That is all, your Honor.

THE COURT: I will take these motions . . . Well, I guess Mr. Reese has something to say. He consulted with his associate.

MR. REESE: Without abandoning our opposition to the theory that the Court's order is appealable, I would like to point out to the Court that this investigation has been very, very seriously impeded. I don't think anybody would deny that. However, if the Court grants a stay for a short period

of time for the purpose of accommodating filing of a notice of appeal, I would urgently request that that period of time be very short and that a condition of it be that the senator be ordered to file his appeal within twenty-four hours. I think that is really just a rather perfunctory form of proceeding, a piece of paper filed indicating that the movant intends to appeal [21] the decision of the Court.

THE COURT: Well, I will consider the point, but actually the time limit on the stay would be gauged not simply to counsel's speed but to the availability of the Court of Appeals. Judge Aldrich in the Court of Appeals chances to be at the Judicial Conference of the United States, in Washington.

MR. REESE: I see.

THE COURT: He is not in Boston today. That is another consideration. But I had one other — Oh, this matter of impeding of the grand jury investigation. I just don't like to let these comments go without the Court's comments. I was constrained to comment when Mr. Reinstein said three times that the senator was a target, or implied that the senator was a target of this investigation. As far as the delay of the grand jury proceedings is concerned, I think the delay has been at least partially attributable to the necessity of government counsel's being all over the country in this matter.

I am thinking, for example, of the matter set for hearing tomorrow morning. The government requested a ten-day or two-week postponement. I was prepared to hear that matter a week or more ago, and it was set down for tomorrow because the government asked that the hearing be scheduled for some time on or after the 28th of – I think it was after the 28th of October, so I don't consider that the delay here can be attributed to anybody. I think it is in the nature of the [22] situation, and I don't charge these witnesses or defense counsel or anyone, including government counsel, with the delays. These delays are just in the nature of the situation.

MR. REESE: I understand, your Honor. I should have used the word delay. Incidentially, as to the matter that

was to be heard tomorrow, I noticed for ten days out of consideration for counsel for the witness in that case. I would have been delighted to have it heard immediately. It was no convenience of mine that was a factor in that ten-day period.

THE COURT: That is what I mean by the nature of the situation. These delays are sometimes required by the complexity of the problems presented.

I will take a short recess and come out and announce my ruling on this matter.

Mr. Reinstein wants to get in the last word.

MR. REINSTEIN: Well, your Honor, we also have the question of the motion for further relief to be discussed.

THE COURT: Oh, I am considering that. I have it here. I thought that your remarks had encompassed that.

MR. REINSTEIN: No, your Honor, they did not. The motion for further relief is somewhat separable from our motion to intervene and to quash in the Webber case.

THE COURT: Well, then, say what there is to this over and above what you have already said.

MR. REINSTEIN: Yes, your Honor. Subsequent to your [23] Honor's memorandum and decision of October 4th, we obtained information which made it necessary for us to file this motion for further relief and also a motion for a stay of all grand jury subpoenas outstanding, that were issued by this particular grand jury.

The reasons for this are two-fold. First, we have learned that the United States Government has subpoenaed witnesses who possessed information on the issue of republication. I am referring not only to Mr. Webber and to Dr. Rodberg; there are other witnesses as well. We do not have, unfortunately, a list of all of the witnesses whom the grand jury has subpoenaed. We do have information, though, that from the names that we have now, a substantial number of them do possess information on the issue of republication, and in prior conversation with Mr. Reese, he was fairly forthright in admitting that the grand jury was interested in that question.

Secondly, we have also learned that the United States has subpoenaed certain other witnesses for the purpose of inquiring into matters which we believe are barred from inquiry by your Honor's protective order of October 4th. We do know that certain witnesses possess privileged information, first of all, and second of all, again, in discussions with Mr. Reese on October 12th, he did tell us that the government was interested in finding out the source of the material which Senator Gravel used to prepare for the subcommittee hearing on June [24] 29th and the material which was then inserted into the record. We believe that this and other questions of privileged information which these witnesses possess have to be determined in advance, or else there is the same threat as there is in the Rodberg and Webber case of Senator Gravel's constitutional rights being violated without any mechanism being available for us to object and for the Court to construe the meaning of its protective order of October 4th.

We therefore moved that the United States provide a listing of all of the witnesses who have been subpoenaed or are scheduled to appear before the federal grand jury in order that it may be determined which of these witnesses, in addition to the ones that we know of already, possess privileged information or are in the position of Mr. Webber and Dr. Rodberg, and then we would like with respect to those witnesses a hearing to be held to determine what relief can be granted to Senator Gravel.

We propose here, as with Dr. Rodberg and Mr. Webber, that the only feasible technique is a governmental specification on the proposed scope and the questions to be asked by the grand jury, as the government did in the case of United States versus George and the Caldwell case. They did that voluntarily, and they were ordered to do that by the District Court in the Verplanck case as a prerequisite for continuing.

Those cases involved issues of much lesser constitutional [25] importance. At least, United States versus George did. The court there was concerned with a nonconstitutional

ptivilege, the husband-wife privilege, as well as the right of a person not to be called by a grand jury on the same matter for which he has been indicted. The government there voluntarily provided a specification.

The Caldwell case involved issues of substantial constitutional importance under the First Amendment, and so did Verplanck, and the issues we are raising here are at least as important in the context of separation of powers and the free speech rights of members of Congress.

The government has never responded to our argument that a specification was necessary and that it is impossible for there to be scrupulous compliance with a protective order and judicial review of it without the court's overseeing what is happening in advance in the grand jury. This is a technique that the Supreme Court has ordered in First Amendment cases involving seizures of allegedly unprotected written material and injunctions against demonstrations.

We don't see, particularly with the fact that the government has subpoenaed Mr. Webber particularly – we might also mention Mr. Chomsky, who has information on the issue of republication, and whom we believe the government has subpoenaed for that purpose. The government has done this even though your Honor took under reconsideration at that very time our [26] motion for reconsideration on the very issue of republication, which is dispositive of the Webber case, at least, and probably the Chomsky case.

THE COURT: The reason for the Court's taking it under advisement was to enable the government to reply. I didn't wish to rule on the matter without giving government counsel an opportunity to reply.

MR. REINSTEIN: And what the government did was, thereupon . . I am not accusing the government of bad faith; I am just trying to illustrate the difficulties we have in trying to assure Senator Gravel's rights under the protective order will in fact be sustained, because in the interim, the government subpoenaed at least two people for the purpose of inquiring into the question of republication while your Honor had the motion for reconsideration under advisement

and while the stay of the subpoena to Dr. Rodberg was issued.

We also have the fact that the government has told us that they were very much interested in finding out the source of material that a United States Senator obtained and used in preparation for a speech in a subcommittee report. We think that is barred by the first provision of your Honor's protective order. We also know there is other information which proposed witnesses have which relates to the conduct of the hearing itself, the preparation for it, and conduct antecedent to it which is intimately related to the subcommittee hearing.

[27] THE COURT: It is things done by the senator, not by Dr. Rodberg. It is not things done by other persons.

MR. REINSTEIN: Yes, your Honor.

THE COURT: In other words, if these papers, let's say hypothetically, passed through the hands of Mr. X and Mr. Y before they came into the senator's possession, I don't expect that any reasonable construction of the first paragraph in the protective order would bar inquiry into the actions of Messrs. X and Y.

MR. REINSTEIN: We are not suggesting that. We are suggesting that the inquiry that the government intends is to find out how Senator Gravel himself, first of all, obtained the information, how he prepared for the hearing. The information which we are talking about is information which people know of. With respect to Senator Gravel himself —

THE COURT: Let me ask some questions of Mr. Reese on this matter.

MR. REINSTEIN: Yes, your Honor.

THE COURT: What is your response to these points?

MR. REESE: Well, my response, your Honor, is along the lines of the hypothetical that your Honor just presented on X and Y. I have got to deny the factual assertions made by counsel here that we are concerned with Senator Gravel's activities with regard to these papers and the preparation of his meeting and the reading into the record of the papers and [28] and so on. We are definitely interested in the

sources of the papers, and it seems to me I made that fairly clear in my comments to counsel on the occasion of our first meeting.

Incidentially, your Honor, I suppose I should go on to say in response to counsel's argument that we would effectively be deprived of an investigative tool which is legitimately ours, it goes without saying, if what was permitted was virtually unfettered surveillance by the senator of the scope of the investigation.

THE COURT: Here is the other problem raised by Mr. Reinstein: Pending appeal, perhaps the Court should consider some sort of protective order relating to the republication insofar as the senator, either personally or through Dr. Rodberg, took actions directed toward republication. I am aware that on the merits I felt that the government was sound in its position that republication was not embraced by the speech or debate clause. I surely, however, could not characterize as frivolous the position taken by Senator Gravel's counsel. What would the government's view be toward refraining from, pending appeal, exploration of things done by either Senator Gravel or Dr. Rodberg in connection with republication?

MR. REESE: May I confer for just a moment?

THE COURT: Yes.

[Brief pause.]

MR. REESE: Well, your Honor, the government's position [29] is that we should not agree to that approach because of the possibility of our conducting an investigation into the sources of publication of the Pentagon papers by other entities which could conceivably lead us to the identification of Dr. Rodberg as a source, and then we would be coming up against the problem which would be presented by this kind of a protective order.

THE COURT: Well, I will take these matters under advisement for a short period of time. Do you have some final point?

MR. REINSTEIN: Yes, I do, your Honor. I would just like to make the point that the discussions that have gone

on now about the two questions of the propriety of proposed questions before the grand jury, we just meant those to illustrate the problems that we have of enforcing and that the Court has in judicial review of enforcing the protective order. We now have debates upon the legality of two proposed questions. We cannot anticipate all of the proposed questions.

I don't think we can ask to post a sentry outside of the grand jury room door to see who is being called and whether he knows anything about Senator Gravel. That is why, your Honor, in the motion for further relief we have asked for a listing of the names of these people and a determination of which ones have privileged information, so that some sort of specification procedure or another procedure of that sort can be used [30] to insure judicial review of these questions. The same thing is going to happen in the grand jury room, with one difference, and that is, the witness will be in no position to determine whether or not the government is violating, albeit unintentionally – we don't accuse them of bad faith – but in any case, the witness cannot determine your Honor's protective order and whether or not questions posed to him are barred by the protective order or whether there is a substantial question as to whether or not they are. That is why we are asking for a specification that the government has characterized as our position of surveilling the grand jury, which I think is incorrect, your Honor, given the fact that the government has voluntarily used this exact procedure before in cases of lesser constitutional magnitude.

THE COURT: You have said that before. We will not take a recess.

[A recess was taken.]

AFTER RECESS

THE COURT: Here are my rulings on these matters. First, in the Webber matter, the motion to intervene is allowed. With respect to the motion to quash or stay the grand jury subpoena, the motion to quash is denied but the

motion to stay is allowed to the extent that enforcement of the subpoena on [31] Howard Webber is stayed for ten days. I haven't written out in the margin the purpose, which I think is obvious. It is contemplated that counsel for Senator Gravel as intervenor will appeal promptly, and the stay for ten days is allowed rather than three or five or seven because whether the stay should be extended is the sort of question that has to be given some consideration by the Appellate Court.

Those, incidentially, are in EBD 71-209. The Clerk's Office opened up a separate case with respect to Mr. Webber.

Now with regard to 71-172, which has to do with Dr. Rodberg, there are similar orders entered. On the motion of the senator for reconsideration and stay pending reconsideration or appeal, the motion for reconsideration is denied, but the motion to stay is allowed to the extent that enforcement of the subpoena on Leonard Rodberg is stayed for ten days, and the other orders in that case are parallel.

The government filed a motion for an order commanding Leonard Rodberg to appear before the grand jury today. That motion is denied without prejudice to renewal upon expiration of stay or stays, as the case may be, of enforcement of the subpoena on Leonard Rodberg granted on the motion of the intervenor, Senator Gravel.

Now we have here a motion by Dr. Rodberg for rehearing or certification, and for stay. The motions for rehearing or certification are denied. The motion for stay is mooted by [32] the stay of ten days granted on the motion of Senator Gravel. In other words, the party here who has standing to appeal and whose interests are at stake is the intervenor, Senator Gravel, and is not Dr. Rodberg. It is on the senator's motion, not on Dr. Rodberg's, that the stay is granted, but the effect is the same. Dr. Rodberg may not be questioned by the grand jury for a period of ten days. Whether that period is longer than ten days will be something that will be decided by the Appellate Court.

Now, on the motion for further relief, I have not written the order as I have in the other motions because there is

not room in the margin to write what I will write when I get downstairs this noontime, or after the noon recess. With respect to this motion for further relief, I don't know whether it should be said it would be denied in part and allowed in part, but this is what I will be writing. It is denied to the extent that it requires the government to list witnesses and to file lists of questions that are going to be asked of witnesses and in other respects to sort of preview the grand jury's interrogation to be sure that the senator's rights are not violated. It will, however, be allowed to this extent: that the Court will fashion a supplemental protective order of the same duration as the stay barring inquiry into acts done either by Senator Gravel, or by Dr. Rodberg as his agent, arranging for the republication of the Pentagon papers.

[33] I will say by way of explanation, I am not granting the relief in the form of lists of witnesses and questions and that sort of thing, because the Court relies, and feels it has good reason to rely, on the intelligence and good faith of government counsel in abiding by the Court's protective orders. I don't need to be at government counsel's elbow to be sure that unambiguous orders are obeyed. That is the reason I want to write this rather than just state it orally. I want to be certain that the supplemental protective order contemplated is in writing such that it can be a clear guide to government counsel.

The purpose of it is, I trust, obvious, and that is that until the Court of Appeals has had a look at this case and these motions, the substantial point which Senator Gravel seeks to preserve must be protected, and absent the supplemental order that I have outlined, the point could be mooted by questions which would be answered by grand jury witnesses, without any means of protecting and preserving his point.

I hope to file this order in writing this afternoon, but in the interim I would specifically direct government counsel to abide by what I have said at this time.

I think that disposes of the motions that are pending to be heard this morning. I don't think it disposes of them to everyone's satisfaction necessarily, but is there anything that is pending that has not been ruled on?

[34] MR. FISHMAN: Well, just one minor item we would point out, your Honor, which is, on the motion for further relief we also specifically addressed ourselves to the question of how Senator Gravel received the papers. One allegation —

THE COURT: Yes, but I consider that the order already entered covers that.

MR. FISHMAN: In the sense – I want to make it for the record, your Honor – in the sense that your Honor's order prohibits the government from questioning any witness now or possibly in the future who are to be brought before the grand jury with respect to how Senator Gravel got those papers. Is that correct, your Honor?

THE COURT: It bars inquiry into what he did or what Dr. Rodberg did after Dr. Rodberg was hired as the Senator's assistant. It does not bar inquiry into what Dr. Rodberg did previous to his becoming an assistant.

MR. FISHMAN: That is correct, your Honor. That is correct.

THE COURT: Or members of the Senator's personal staff. All I can do is repeat the X and Y example. Whatever he did is privileged and may not be inquired into, but let's — Well, really, all I have to say is, read the Johnson case again. That is all I can recommend. I am not going to enlarge upon the memorandum I wrote. I endeavored to spell it out in the protective order already entered, and I think I did, so [35] I am not going to enlarge upon that further at this time.

MR. FISHMAN: That is satisfactory.

THE COURT: And I don't know who is going to be here tomorrow. What is on for tomorrow?

MR. REESE: Mrs. Marx, your Honor.

THE COURT: Mrs. Marx.

MR. REESE: And Mr. Chomsky.

THE COURT: And Prof. Chomsky.

MR. REESE: Yes, your Honor.

THE COURT: All right. Well, that concludes this matter. And we will get the jury in the land damage case.

MR. REINSTEIN: Thank you, your Honor.

MR. FISHMAN: Thank you, your Honor.

[Thereupon the hearing was concluded.]

VOLUME 5

[Caption Omitted in Printing]

DONALD M. WOODRING, sworn
Direct Examination by Mr. Reece

[54] Q. Would you give the Court your name and address and current employment? A. Donald M. Woodring. I am assigned to the Boston Division, Federal Bureau of Investigation.

Q. Pursuant to that employment, Mr. Woodring, when did you first call on the New England Merchants Bank? A. I believe it was last Wednesday.

Q. Last Wednesday.

THE COURT: A little louder please. I am the gentleman who is supposed to be hearing this.

THE WITNESS: Excuse me. It was Wednesday.

Q. Was that before the subpoena was served or after? A. To my knowledge it was after the subpoena was served.

Q. Did you call upon the bank before the subpoena was served? A. No, sir.

Q. To your knowledge did anyone else from your agency call upon the bank? A. I have no idea.

Q. Who did you have conversation with on Wednesday when you first called on the offices of the bank? A. W. Clifford Gittins. He is Assistant Vice President.

[55] Did you talk with any other officers of the bank on that date? A. No, sir.

Q. When did you next visit the bank? A. I haven't been there since Wednesday.

Q. Wednesday of last week? A. Just this past Wednesday.

THE COURT: We are talking about two Wednesdays then?

THE WITNESS: No, sir, one day.

THE COURT: I thought you said you went to see him before the subpoena was served.

THE WITNESS: No, sir. I said I did not.

THE COURT: I beg your pardon. If you will please keep your voice up? This is a big room.

THE WITNESS: Yes, sir.

Q. So this past Wednesday was the first time you visited the bank? A. That's true.

Q. And to your knowledge it is the first time anyone from your agency had visited the bank?

MR. BACHMAN: Well –

A. Well, someone, it is my understanding that someone was over there to serve the subpoena.

[56] Q. Is it your understanding someone was there prior to the service of the subpoena? A. No, to serve the subpoena.

Q. Is it your understanding – do you understand whether anybody was there before the service of the subpoena? A. I have no idea as to that.

Q. Who accompanied you on Wednesday, this past Wednesday, when you went over? A. This would be Special Agent Charles Hickey.

Q. Is he in the court room today? A. No, sir.

Q. Is he in this building today? A. I have no idea.

Q. Would you tell the Court what you did at the bank on this day? A. Yes. I went into Mr. Gittins' office, and he was not in the office at the time I walked in. I had called him before I went over so he was expecting me, and his secretary was present. She said, "What you want to see is here."

Q. Do you know her name? A. Mrs. Hume. I believe. She said, "The documents you're looking for are right here."

Q. I can't hear you.

[57] MR. REECE: Your Honor, I don't hear him well either.

Q. Would you mind keeping your voice up? I can't hear you, sir. I apologize. A. I always think I'm talking too loud and end up going down. She said, "The documents that you're interested in are here on the desk. If you want to sit down, fine."

Q. So at the time you made this visit there had been collected for you some bank documents? A. That's correct.

Q. Which were turned over to you? A. That's correct.

THE COURT: He didn't say they were turned over.

Q. They were given to you for your inspection? A. For examination, that's right.

Q. Who was present while you inspected these documents? A. Mrs. Hume was sitting at her desk. Special Agent Hickey was there. And after very few moments Mr. Gittins arrived.

Q. What did you do in reference to these documents? A. All I did really was to page through them, noting the description of the account, and attempted to eliminate [58] those accounts which I felt we would not be interested in.

Q. What was the criteria for determining what you would be interested in or would not be interested in? A. I felt that what we will be interested in would be a general operating account, and on that basis I could eliminate the payroll account, a building management fund, and things of that sort.

Q. What was your interest in the general operating account?

MR. BACKMAN: I object.

THE COURT: Excluded.

Q. What did Mr. Hickey do in connection with these documents? A. I don't know that he did anything except sit there with me while I looked at them.

Q. Did either of you make any copies? A. No, sir.

Q. Did either of you make any notes as a result of your examination of the documents? A. I did not.

Q. Did Mr. Hickey? A. I don't know.

Q. Weren't you both sitting together? [59] A. Yes. We did not make any notes at the time we were in the office. What he may have written up when he returned to the office I don't know. I was there, I might add, because

of my familiarity with bank records in general, that is basically being an accountant.

Q. Had you been familiarized with the Court's order in respect to this subpoena? You knew the subpoena had been served? A. I knew there was a – I had been told there was a subpoena served.

Q. Had you been told that the Court had taken any further action in regard to this subpoena? A. No, not that particular subpoena.

Q. Sir? A. I was aware of no action in regard to that particular subpoena.

Q. How did it happen that you visited the bank on that day, on Wednesday, this past Wednesday? A. I was asked to do so by superiors in the office.

Q. Would you indicate to the Court what superiors ordered you to do so?

THE COURT: I am losing you, Mr. Reed.

Q. Would you indicate to the Court what superiors ordered you to appear at the bank? [60] A. I'm trying to think. Actually, the instructions I got came from my own supervisor, Thomas J. Honan, and the instructions, and so forth, came from another agent, who is Robert Bowe.

THE COURT: Have we got it clear what the instructions were?

MR. REED: No, sir.

Q. What were the instructions, sir? A. I was told to discuss with the Vice President of the bank means of simplifying the request in the subpoena.

THE COURT: Means of simplifying what?

THE WITNESS: The request in the subpoena. In other words, it was a rather blanket subpoena, and we were trying to narrow down just where our interest might lie.

Q. What criteria was given to you for narrowing your inquiry? A. Well, that is difficult to say. We were looking for certain payments and transactions, which would not occur, say, in some of these other accounts which I eliminated.

Q. Was the criteria limited by the publication of the Pentagon Papers?

MR. BACHMAN: I object, your Honor.

[61] THE COURT: Well, that is a leading question, I suppose. Strike it out.

Q. There came a time then, I gather, that you decided you were interested in some records and not interested in other records? A. That is correct.

Q. Was the subject matter of the Grand Jury inquiry discussed with you?

MR. BACHMAN: I object.

THE COURT: He may answer.

A. Could you clarify that a little, please?

Q. You knew a Grand Jury subpoena had been served on the bank? A. Yes.

Q. Did anyone ever discuss with you the scope of the Grand Jury inquiry? A. Not really. As I say, I am not involved in the investigation or any other matters other than as a kind of accounting advisor, put it that way.

Q. You were given such information so you would know what bank records were relevant and what were not relevant, were you not?

MR. BACHMAN: I object, your Honor.

THE COURT: He may answer.

[62] THE WITNESS: I may answer?

THE COURT: Yes.

A. Yes, sir.

Q. How did you determine that relevancy? A. Well, I knew the things we would be interested in would be transactions in a general account, general operating account.

Q. Relating to what? A. Well, relating to certain of the transactions we might be interested in. I don't quite know how to –

THE COURT: You have gone all the way around the barn without letting us know what kind of barn it was.

THE WITNESS: Well, we were interested in the so-called Pentagon Papers.

Q. In the publication of the Pentagon Papers? A. Right.

Q. Were you interested in any transactions with relation to Senator Gravel?

MR. BACHMAN: I object.

THE COURT: What is the objection?

MR. BACHMAN: I think he has already answered the question, that the Pentagon Papers was the general subject given to him, and that is all there was.

[63] THE COURT: He may answer.

THE WITNESS: I shall answer?

THE COURT: Yes.

A. Yes, sir.

Q. What is your answer, sir? A. Yes, sir.

Q. When is your next appointment with the bank? A. I have none.

Q. When you left the bank what was your understanding as to what would be done? A. That certain of the transactions contained on the account that we had narrowed the thing down to –

Q. That you had identified? A. Yes. In other words, we ended up with two accounts that we would be interested in and some of the backup material to those accounts was going to be prepared for us.

MR. REED: That is all, your Honor.

CROSS EXAMINATION by Mr. Bachman

Q. Mr. Woodring, could you describe the type of document that you or the documents that you examined while you were over there? A. Yes.

[64] What I looked at was bank copies, in some cases photostatic copies, of normal bank statements, the kind everyone would get.

THE COURT: Copies of normal bank statements?

THE WITNESS: Yes, the bank statement that you would get at the end of each month.

THE COURT: By "normal" do you mean typical? I don't know what "normal" means.

THE WITNESS: Yes.

THE COURT: I don't want to put words in your mouth. I am very curious as to the detail of what you were looking at. How detailed was it? How extensive was it?

THE WITNESS: This would be that bank statement that would be very similar or exactly the same really that any individual would get as a statement of his account at the end of the month.

Q. Would you describe the information that these papers or that any one of these papers contained, not specifically but the type of information? For example, did it contain the name of the account? A. Yes.

Q. The account number. A. Right.

[65] Q. Was it a statement of the deposits that were made to that account during a given period of time? A. That is correct.

THE COURT: Like the monthly foldover statement?

THE WITNESS: Yes, sir.

Q. And it was a statement of the amount of the checks drawn? A. That is correct.

THE COURT: Was this a monthly statement?

THE WITNESS: Yes, it was.

THE COURT: How many of them did you look at?

THE WITNESS: I believe they covered from July through October.

THE COURT: Of nine different accounts?

THE WITNESS: I do not recall the exact number of accounts, but I would say somewhere between eight and ten.

THE COURT: Well, if they already had the statements, what were all these items that would have to be prepared?

THE WITNESS: This would be photostatic copies of the individual checks.

THE COURT: So if it just said $5,280, you didn't know what that was for or who it was to?

[66] THE WITNESS: That is correct, sir.

THE COURT: Thank you.

Q. Did you make or did anyone in the bank make and give you any copies of these statements? A. No, sir.

Q. Did you make any notes of the items that appeared on the statements? A. No.

Q. Did you make any notes as to the various account names or numbers? A. No.

Q. Did you subsequently make any report of any of the information contained in any bank statement or any of the statements which you looked at? A. No, I did not.

Q. To your knowledge did Mr. Hickey? A. Not to my knowledge, no.

MR. BACHMAN: May I have a moment, your Honor?

THE COURT: Yes.

Q. Did you have a conversation with Mr. Gittins as to which accounts you would not be interested in? A. Yes, I did.

Q. About how many of the between eight and ten accounts did you tell him there would be no interest in? [67] A. All of them but two.

Q. Did you make any arrangements with Mr. Gittins to receive in the future any documents from him or from the bank concerning or that might have appeared on the statement or where items might have appeared on the bank statements? A. Yes.

Q. Did you understand the question? A. Maybe I didn't.

Q. Did you make any arrangements to come over and pick up any copies of any documents at a later time? A. In an indirect way, yes. He was going to copy, as I mentioned, some checks, deposit tickets, and so forth, and then notify the office, and at that time we would pick them up.

Q. Have you received any notification from him? A. No.

THE COURT: This is Mr. Gittins?

THE WITNESS: That is correct, sir.

MR. BACHMAN: I have nothing further, your Honor.

MR. REED: That is all, your Honor.

THE COURT: Thank you.

MR. REED: Thank you, Mr. Woodring.

[68] MR. FISHMAN: I don't know what would be involved on the basis of this, your Honor.

THE COURT: A little louder.

MR. FISHMAN: I don't know what would be involved at this point, but on the basis of this testimony we think it

would be important to call Special Agent Hickey in to pursue this line a little further to establish just what he did.

THE COURT: Where is Mr. Hickey?

MR. BACHMAN: I have no idea, your Honor.

THE COURT: When did you last see him?

MR. BACHMAN: I don't believe I have ever seen him.

THE COURT: You, sir?

MR. REECE: Your Honor, I talked with Special Agent Dan Glasgow, I think about 1:30 I talked to him, and I asked him the names of the agents who went to the bank, and he gave them to me, and he said that neither of them was in, that one of them was in the field, I think it was Mr. Hickey, I'm not sure, and I told him to have him call me immediately. I, of course, have not been in my office for some time, and I have had no response with the exception, of course, of Mr. Woodring.

[69] THE COURT: Well, we will take a recess for you to go down and see whether Mr. Hickey is around and available.

MR. REECE: Very well, your Honor.

(Recess.)

(Arguments of counsel.)

[71] INDEX TO WITNESSES

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